APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 95-1754

HONEYWELL, INC.; HONEYWELL PENSION and RETIREMENT COMMITTEE, on their own behalf and on behalf of the Honeywell Retirement Investment Plan; INVESTMENT PLUS PLAN OF HONEYWELL, INC.; HONEYWELL RETIREMENT SAVINGS PLAN; FIRST TRUST NATIONAL ASSOCIATION,

Plaintiffs-Appellants,

v.

MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION,

Defendant-Appellee.

Submitted Oct. 22, 1996

Decided April 2, 1997

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges, en banc.

HANSEN, Circuit Judge.

The plaintiffs (collectively referred to as Honeywell) appeal the district court's [1] grant of summary judgment for

[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

the defendant, Minnesota Life and Health Insurance Guaranty Association (the Association), in this declaratory judgment suit. At issue is whether an amendment to a Minnesota statute, which amendment applies retroactively, violates either the Contract Clause or the Due Process Clause of the Constitution of the United States. The district court granted the Association's motion for summary judgment and dismissed Honeywell's complaint, concluding that the amendment passes constitutional muster.

A panel of this court unanimously affirmed the judgment of the district court. *Honeywell v. Minnesota Life & Health Ins. Guaranty Assoc.*, 86 F.3d 766 (1996). Honeywell requested en banc review. We granted this request, vacated the panel's opinion on August 27, 1996, and heard the case en banc. We now affirm the judgment of the district court.

I. BACKGROUND

Honeywell, Inc. is a Delaware corporation with its principal place of business in Minnesota. Honeywell sponsors certain defined contribution benefit and retirement plans for its employees. These plans include the Honeywell Retirement Investment Plan, the Investment Plus Plan of Honeywell Inc., and the Honeywell Retirement Savings Plan. The current trustee of the Honeywell plans is First Trust National Association, which has its principal place of business in Minnesota.

The Association is a nonprofit Minnesota corporation created pursuant to the Minnesota Life and Health Insurance Guaranty Association Act (the Act), Minn.Stat.Ann. §§ 61B.01-61B.16 (West 1986).[2] The Association exists

[2] This Act has been repealed and was replaced in 1993, with Minn. Stat.Ann. §§ 61B.18-61B.32, (West Supp.1996). The legislature provided, however, that §§ 61B.01-61B.16, as amended in 1992, remain applicable to the subject of this suit. *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Assoc.*, 518 N.W.2d 557, 558 n. 4 (Minn.1994). The issue in this case deals with a 1992 amendment to the Act, and not the new 1993 version of the Act.

to protect the contractual rights of policy owners and beneficiaries of life insurance policies, health insurance policies, and annuity contracts (subject to certain definitions and limitations), when the insurer that issued the life insurance, health insurance, or annuity contract becomes financially unable to perform its obligations. *See* Minn. Stat.Ann. § 61B.02, subd. 2. *See also Minnesota Life & Health Ins. Guar. Assoc. v. Department of Commerce*, 400 N.W.2d 769, 770 (Minn.Ct.App.1987). To provide this protection, all insurance companies that deal in life, health, and annuity contracts and elect to do business in Minnesota are required to join and contribute to the Association. *Minnesota Life*, 400 N.W.2d at 770. The dispute in this case arose following the 1991 insolvency of an out-of-state member insurance company and the 1992 enactment by the Minnesota legislature of an amendment that retroactively redefines the term "contractual obligation" under the Act.

In 1988, the Honeywell plans' trustee, who was a Minnesota resident (as is the current trustee), invested in Guaranteed Investment Contracts (GICs) issued by Executive Life Insurance Company of California (ELIC), a member of the Association. GICs are unallocated annuity contracts, or annuity contracts "not issued to or owned by a named individual." *Id.* GICs are investments made by the trustee for the benefit of the plan participants and are considered covered policies under the Act. *See id.* at 775 (holding that GICs are covered annuities under Minn. Stat. § 61B.03, subd. 3 (1984)). The Honeywell GICs expressly name the Honeywell trustee as the policy owner, and not the individual plan participants for whom the investment was made. *Honeywell*, 518 N.W.2d at 561.

In 1991, ELIC became insolvent and unable to fulfill its contractual obligations on the Honeywell GICs, which amounted to $111,000,000. By letter dated January 10, 1992, the Honeywell trustee, as the resident policy owner, submitted to the Association a claim for guaranty cover-

age under the Act. Honeywell sought coverage for ELIC's entire obligation to the Honeywell trustee, which would inure not only to the benefit of Honeywell's 9,000 Minnesota resident plan participants but also to Honeywell's 27,000 nonresident plan participants.

The Association neither granted nor denied Honeywell's claim initially. ELIC's insolvency had also affected approximately 10,000 other Minnesota residents who were employed in Minnesota by other companies whose plan trustees owned GICs but which trustees were *not* Minnesota residents. At that time, the Act required the Association to guarantee the covered policies of "residents" to whom any "contractual obligation" was owed from an out-of-state insurer. Minn.Stat.Ann. § 61B.06, subd. 2 (West 1986). *See Honeywell*, 518 N.W.2d at 558. The term "resident," defined as "any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed," Minn.Stat.Ann. § 61B.03, subd. 13 (West 1986), was broad enough to include a trustee who resided in Minnesota. *Honeywell*, 518 N.W.2d at 560-61. The term "contractual obligation," defined as "any obligation under covered policies," Minn.Stat.Ann. § 61B.03, subd. 5 (West 1986), was broad enough to include a GIC obligation owed to a resident trustee. *Honeywell*, 518 N.W.2d at 560-61. Thus, as then codified, the Act, combined with ELIC's insolvency, created the potential that all the Honeywell plan participants, thousands of whom were not residents of Minnesota, might be entitled to coverage under the Minnesota Act because their plan trustee happened to be a Minnesota resident. Whereas, many other Minnesota non-Honeywell employed resident plan participants, who worked for companies whose plan trustee resided in a different state, might not be entitled to any coverage because their trustee (the one to whom the contractual obligation was owed) was not a Minnesota resident.

Faced with this dilemma, on January 21, 1992, the Minnesota Department of Commerce (which supervises

and regulates the Association and to whom appeals may be taken from the Association's determinations, *see* Minn. Stat.Ann. § 61B.09(c)), issued an opinion, advising the Association chairman on the coverage problems created by the ELIC insolvency:

> The Department believes it is the clear intent of the Act to cover the people of Minnesota. Accordingly, it is the Department's position that the Guaranty Association Act provides coverage to Minnesota resident employees who are the beneficiaries of defined-contribution pension plans funded by Guaranteed Investment Contracts purchased from Executive Life.
>
> Consistent with that position the Department has determined that non-resident employees of such a plan, regardless of the residency of the trustee or plan sponsor, are not covered under the Act.

(Appellee's App. at GA-59.)

Subsequently, on April 27, 1992, the governor signed into law an amendment to the definition of the term "contractual obligation," in a purported attempt to retroactively "clarify" the statutory coverage in a manner consistent with the Department of Commerce opinion. *Honeywell*, 518 N.W.2d at 562. The 1992 amendment, which specifically applies retroactively, narrowed the definition of "contractual obligation" to specifically *exclude* any obligation owed "to nonresident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the date of impairment." 1992 Minn.Laws, ch. 540. Thus, the amendment expressly provides coverage only to plan participants who are Minnesota residents. In light of the opinion of the Department of Commerce and the retroactive 1992 amendment, the Association took the position that its guaranty obligation to Honeywell covers

only those Honeywell plan participants who resided in Minnesota when ELIC became insolvent.

Honeywell then brought an action for declaratory and injunctive relief and monetary damages in Minnesota state court based on the Association's refusal to fully guaranty the whole of the trustee's claim. Honeywell sought a declaration that retroactive application of the 1992 amendment violates both the Contract Clause and the Due Process Clause of the Constitution because Honeywell's entitlement to coverage and payment under the prior statute had fully accrued before the enactment of the 1992 amendment. The Association removed the case to federal district court pursuant to 28 U.S.C. § 1441.

After removal, the parties filed cross motions for summary judgment. The district court ruled in favor of Honeywell, holding that the retroactive abrogation of Honeywell's guaranty coverage rights impermissibly destroyed vested rights in violation of both the Contract Clause and the Due Process Clause of the Constitution. After the Association moved for reconsideration, however, the district court vacated its initial opinion and certified two questions to the Supreme Court of Minnesota: (1) Did the 1992 amendment to the Act's definition of "contractual obligation" effect a substantive change in the Association's obligations or merely clarify existing obligations? (2) Is the annuity contract owner's (the trustee's) right to guaranty payment from the Association a purely statutory right or is it contractual in nature? The Supreme Court of Minnesota ruled on the certified questions, holding that (1) the 1992 amendment to the definition of "contractual obligation" substantively changed the Association's coverage obligations, and (2) the right to payment from the Association is a purely statutory right under state law. *See Honeywell*, 518 N.W.2d at 563.

After the Supreme Court of Minnesota responded to the certified questions, the parties again filed cross motions for summary judgment. This time, the district court granted the Association's motion for summary judgment,

concluding that retroactive application of the 1992 amendment did not violate either the Contract Clause or the Due Process Clause, and dismissed Honeywell's complaint with prejudice. Honeywell appeals.

II. DISCUSSION

Honeywell contends that its preamendment right to insurance guaranty coverage is contractual in nature and that retroactive application of the amendment constitutes the impairment of its contractual rights in violation of the Contract Clause. Honeywell also argues that the 1992 amendment arbitrarily and irrationally destroyed its accrued, vested right to guaranty coverage, in violation of the Due Process Clause. We begin our analysis with the Contract Clause.

A. CONTRACT CLAUSE

The Constitution provides, "No State shall . . . pass any Law impairing the Obligation of Contracts. . . ." U.S. CONST. art. I, § 10, cl. 1. Read literally, this constitutional prohibition bans any interference with contracts, but cases interpreting the clause clearly indicate that this prohibition "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 428, 54 S.Ct. 231, 236, 78 L.Ed. 413 (1934). Instead, when a litigant contends that a legislative amendment has impermissibly impaired contractual obligations, our inquiry initially focuses on "whether the change in state law has 'operated as a substantial impairment of a contractual relationship.' " *General Motors Corp. v. Romein,* 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L.Ed.2d 328 (1992) (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978)) (other citation omitted). Three basic components are essential to this inquiry: (1) Does a contractual relationship exist, (2) does the change in the law impair that contractual relationship, and if so, (3) is the impairment

substantial? *Id.* If we conclude that a substantial impairment of a contractual relationship exists, we must then carefully examine "the nature and purpose of the state legislation." *Allied Structural Steel Co.*, 438 U.S. at 244, 98 S.Ct. at 2722.

We first consider whether a contractual relationship exists. In this case, the district court certified to the state supreme court the question of whether the Association's guaranty obligation to GIC owners, such as the Honeywell trustee, is a contractual or a statutory obligation. The Supreme Court of Minnesota determined that the right to payment from the Association is a purely statutory right under *state* law. *Honeywell,* 518 N.W.2d at 563. Honeywell first contends that the district court erroneously certified a question of federal constitutional law to the state court.

While federal courts "accord respectful consideration and great weight to the views of the State's highest court," the determination of whether the Act created a contractual obligation 'is a federal question for purposes of Contract Clause analysis, and whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment." *Romein,* 503 U.S. at 187, 112 S.Ct. at 1110 (internal quotations omitted). Contrary to Honeywell's assertion, however, the district court did not avoid its duty to determine the constitutional issue by certifying a question to the state supreme court. Instead, the district court gave proper consideration to the state court's views but independently determined that the right to payment under the Act is not contractual within the meaning of the Contract Clause. We review de novo the district court's judgment on this constitutional question. *See United States v. Bates,* 77 F.3d 1101, 1104 (8th Cir.), *cert. denied,* —— U.S. ——, 117 S.Ct. 215, 136 L.Ed.2d 149 (1996).

Our independent review leads us to agree with the district court that the rights at issue are statutory in nature

and therefore, no contractual relationship existed between Honeywell and the Association. Two factors lead us to this conclusion: (1) the Act itself does not create a contract, and (2) the GICs do not specifically incorporate the terms of the Act.

First, the Act's guaranty is not itself a contract between the Association and those who qualify for the Act's protection. "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 14, 97 S.Ct. 1505, 1516, 52 L.Ed.2d 92 (1977). The right to payment under the Act is not enforceable against the state of Minnesota but is an obligation imposed upon the Association. The Association is a nonprofit legal entity and not a state agency. Minn.Stat.Ann. § 61B.04, subd. 1 (West 1986). *See also* Minn.Stat.Ann. § 61B.21, subd. 1 (West Supp.1996). Even if the Association were a state agency, the Act contains no "clear indication that the legislature intends to bind itself contractually," which is necessary in order to overcome the general presumption "that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432 (1985) (quotations omitted). Rather, the Act creates an insurance guaranty association with attendant statutory obligations to safeguard the financial well-being of Minnesota residents to whom contractual obligations are owed by its member insurance companies. The Act does not create a contract; instead, it creates a statutory safety net to protect the economic well-being of Minnesota resident policy owners in the event a member insurer becomes insolvent.

Second, while the Association has the power to enter into contracts, Minn.Stat.Ann. § 61B.06, subd. 9(a) (West 1986), the Association is not a party to the GICs

involved here. The GICs at issue are contracts between the Honeywell trustee and the impaired ELIC, not the Association. The Honeywell trustee did not specifically bargain for protection under the Act, and the Act is not expressly or impliedly incorporated into the terms of the GICs. For the most part, state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts. *Romein,* 503 U.S. at 189, 112 S.Ct. at 111. The Association's statutory obligation to guaranty the insurance coverage of residents protected by the Act does not in any way affect the validity, construction, or enforcement of ELIC's obligation on the GIC. Moreover, there is no evidence that the GICs were created in pursuance of the statutory obligation. *Cf. Coombes v. Getz,* 285 U.S. 434, 442, 448, 52 S.Ct. 435, 436, 438, 76 L.Ed. 866 (1932) (upholding the contractual liability created pursuant to a state constitutional rule of law that was repealed). The 1992 amendment merely altered definitions under the Act, which in turn affect the Association's statutory obligation to the Honeywell trustee, but the amendment did not alter or affect any bargained-for agreement between the Association and the Honeywell trustee. The Contract Clause does not "protect against all changes in legislation, regardless of the effect of those changes on bargained-for agreements." *Romein,* 503 U.S. at 190, 112 S.Ct. at 1107.

We conclude that the Association's obligations are statutory in nature rather than contractual. Absent the existence of a contractual relationship, our Contract Clause inquiry is finished. Accordingly, we affirm the district court's conclusion that the 1992 amendment did not unconstitutionally impair a contractual relationship in violation of the Contract Clause.

B. DUE PROCESS

Honeywell's due process claim presents a closer question. Honeywell argues that retroactive application of the

1992 amendment defeats its vested right to payment under the Act, in violation of the Due Process Clause. Honeywell relies on *Coombes*, 285 U.S. at 439-48, 52 S.Ct. at 437-38, where the Supreme Court held unconstitutional the repeal of a California state constitutional provision that provided a cause of action against corporate directors. The Court stated in absolute terms that "neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired." *Id.* at 442, 52 S.Ct. at 436. More specifically, the Court in *Coombes* held, "a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, § 10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution." *Id.* at 448, 52 S.Ct. at 438. Honeywell also relies on *Ettor v. City of Tacoma*, 228 U.S. 148, 158, 33 S.Ct. 428, 431, 57 L.Ed. 773 (1913), where the Supreme Court held that a statutory right to compensation for property damage caused by the city in the course of grading streets, which right to compensation was complete before a repeal of the cause of action, was a vested property right that could not be retroactively destroyed. Claiming that these cases control the outcome of the case at hand, the Honeywell trustee asserts a vested right to payment under the Act as it existed when ELIC became insolvent, prior to the 1992 amendment.

The Association, on the other hand, urges us to follow more recent Supreme Court precedents in which the Court reviews economic legislation with a very deferential eye and does not accord vested rights status to economic rights. The Association observes that under this modern approach, due process is satisfied as long as a reasonable legislative purpose supports the retroactive application of the legislation. The Association contends that the retroactive 1992 amendment is supported by a reasonable legislative purpose, and alternatively, that no vested rights accrued in favor of the Honeywell trustee upon ELIC's insolvency.

In one sense, both arguments are right. The Supreme Court has never expressly overruled the reasoning of *Ettor* and *Coombes,* which accords great protection to accrued statutory causes of action. In the area of economic legislation, however, we cannot ignore the abundance of cases where substantive due process has evolved into a deferential rational basis analysis. We believe that an understanding of the historical context of *Ettor* and *Coombes* is essential to divine accurately the present weight of their authority on the issue before us. *See Hammond v. United States,* 786 F.2d 8, 11 (1st Cir.1986) (questioning the continued vitality of *Coombes* and *Ettor* because recent cases have retroactively abridged economic and real property rights without always carefully distinguishing these prior cases). *See also* W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking,* 48 Cal.L.Rev. 216, 232 (1960) ("The decision [of *Coombes v. Getz*] seems far too rigid in its conception of permissible legislative change and would almost certainly not be followed today.").

Ettor and *Coombes* were decided during what is referred to in the history of American jurisprudence as the *Lochner* era, named for the pivotal case of judicial activism, *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (invalidating maximum work hours legislation as an unconstitutional exercise of police power). Cases of that era frequently invalidated statutes that limited economic autonomy in a manner thought by the Court to be unnecessary or unwise, but in more recent decisions, the Court plainly sees its role differently: "[W]e do not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952). The reasoning prevalent during the "*Lochner* [era] has been implicitly rejected many times." *Whalen v. Roe,* 429 U.S. 589, 597 & n. 18, 97 S.Ct. 869, 875, 51 L.Ed.2d 64 (1977). *See also United States v.*

Carlton, 512 U.S. 26, 31-34, 114 S.Ct. 2018, 2023-24, 129 L.Ed.2d 22 (1994) (recognizing that three tax cases from the *Lochner* era "were decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded' " (citation omitted)); *Planned Parenthood of S.E. Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, 861 (1992) (recognizing that the demise of *Lochner* era reasoning began in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

Within two years of the *Coombes* decision, substantive due process analysis in the area of retroactive economic legislation began to be framed in terms of reasonableness, drifting away from the *Lochner* era's strict protection of economic freedom and vested rights. *See Blaisdell,* 290 U.S. at 438, 54 S.Ct. at 240 (upholding as an emergency measure a mortgage moratorium law that impaired obligations on mortgage contracts). The Court acknowledged that even the expressly protected obligation of contracts (and similarly, we believe, the concept of vested rights) may be impaired by economic legislation if "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." *Id.* This rational basis substantive due process test appears to have supplanted the legislatively restrictive vested rights mode of analysis, and allows legislatures more freedom in dealing with economic situations. *See, e.g.,* James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights,* 79 Cornell L.Rev. 87, 119 (Nov.1993) ("Modern jurists reject the categorical logic of vesting and consider the statute's justifications under the rubric of substantive due process."); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv.L.Rev. 692, 696-97 (1959-60) (noting that the vested rights analysis has been replaced by balancing three factors: (1) the nature and strength of the public interest served by the statute, (2) the extent to which the statute modifies or

abrogates a preenactment right, and (3) the nature of the right altered by the statute).

In 1976, the Court announced, "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). These authorities leave no doubt that, even though *Coombes* and *Ettor* have never been overruled by the Supreme Court, the modern framework for substantive due process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate governmental purpose. Given the criticism surrounding the Court's *Lochner* era decisions in general, coupled with the development of judicial deference to economic legislation since then, we join those who question the continued validity of the vested rights analysis of *Coombes* and *Ettor* when reviewing the constitutionality of economic legislation, recognizing as we must that only the Supreme Court itself can overrule its precedents. We rely instead on the more recent Supreme Court pronouncements of substantive due process analysis for economic legislation, which articulate a rational basis test.

Our task, then, is to determine whether the retroactive application of the 1992 amendment is justified by a rational legislative purpose, or whether it is illegitimate and arbitrary. Retroactive legislation, like prospective legislation, must meet the reasonableness test of due process. *Usery*, 428 U.S. at 17, 96 S.Ct. at 2893. "But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984). Retroactive economic legislation has been upheld as reasonable even in circumstances where it de-

stroys a settled expectancy or imposes a new liability. *See, e.g., Carlton*, 512 U.S. at 30-31, 114 S.Ct. at 2022-23 (upholding a curative measure that took away an expected and relied upon deduction for estate tax); *Gray*, 467 U.S. at 734, 104 S.Ct. at 2720 (upholding retroactive application of ERISA's withdrawal liability as supported by rational legislative purpose); *Usery*, 428 U.S. at 19-20, 96 S.Ct. at 2894-95 (upholding retroactive aspects of Black Lung Benefits Act of 1972, which required employers to compensate former employees disabled by a work-related disease). The Court has repeatedly noted that although certain economic liabilities or burdens were not anticipated, nevertheless, " ' "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." ' " *Concrete Pipe & Prod. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 637, 113 S.Ct. 2264, 2287, 124 L.Ed.2d 539 (1993) (quoting *Gray*, 467 U.S. at 729, 104 S.Ct. at 2717-18, quoting *Usery*, 428 U.S. at 16, 96 S.Ct. at 2892-93).

Using these standards, we conclude that the 1992 amendment redefining "contractual obligation" was neither arbitrary nor illegitimate. The state has a legitimate interest in regulating the insurance industry, easing the economic burdens of its own residents, and ensuring the economic life of an association created by its statute to protect its residents. The general purpose of the Act at issue in this case "is to protect the future financial stability of individuals," *Minnesota Life & Health Ins.*, 400 N.W.2d at 773, and the preamendment Act expressly provided protection to "residents" to whom "contractual obligations" are owed. Minn.Stat. § 61B.06, subd. 2 (1986). The 1992 amendment serves to narrow the definition of contractual obligation, explicitly providing coverage only to resident plan participants. This is a legitimate purpose.

The 1992 amendment is also curative in nature, even though it worked a substantive change in the law. *See Honeywell*, 518 N.W.2d at 560-63 (holding that the

amendment worked a substantive change in the law because before the amendment, it plainly entitled resident policy owners, including trustees, to coverage). Curative legislation corrects an unintended and unanticipated mistake in the underlying legislation, which went undetected until some time after the original enactment. Certainly, legislatures have the authority to cure inadvertent defects in their legislation. *See Carlton*, 512 U.S. at 30, 114 S.Ct. at 2022 (upholding Congress's attempt to cure, a defect in the tax code). In *Carlton*, the Court concluded that Congress's purpose in retroactively taking away an estate tax, deduction, even though the decendent's executor had relied upon it, was neither illegitimate nor arbitrary because "Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." 512 U.S. at 31, 114 S.Ct. at 2023. We also note the observation of one commentator that "the individual who claims that a vested right has arisen from the defect is seeking a windfall since, had the legislature's . . . action had the effect it was intended to and could have had, no such right would have arisen." Hochman, *supra* at 705.

Here, the Minnesota legislature acted reasonably when it gave retroactive effect to the 1992 amendment in order to cure a drafting defect that might have inadvertently left thousands of Minnesota residents without coverage under the Act due to the ELIC debacle. We agree with the observation of the Supreme Court of Minnesota: "Given that unallocated annuity contracts were not prevalent at the time of the statute's enactment in 1977, the legislature likely did not contemplate how the Act specifically applied to these contracts." *Honeywell*, 518 N.W.2d at 561. Absent retroactive effect, an unintended gap in coverage would have left many Minnesota resident workers (whose trustee resided elsewhere) without coverage, while an unintended windfall in favor of nonresident workers who had a Minnesota trustee would have strained the financial capabilities of the Association and required

Minnesota residents to pay higher premiums to finance the Association's obligation to out-of-state residents. In sum, "the interest in the retroactive curing of such a defect in the administration of government outweighs the individual [trustee's] interest in benefiting from the defect." Hochman, *supra* at 705-06. Thus, we conclude that retroactive application of the 1992 amendment was a rational means by which to accomplish the state's legitimate goals.

Honeywell contends that retroactive application is arbitrary and irrational because there is no connection linking the Honeywell trustee to the ELIC failure that triggered coverage and because the amendment has a disparate impact on non-residents. Neither contention has merit. We have already determined that the retroactive application of the amendment was rational and prevented an unanticipated gap in coverage for resident plan participants and an unexpected windfall for nonresident plan participants. Because the context here is curative in nature, there is no need to demonstrate any connection of the Honeywell trustee to the ELIC failure in order for the legislation to be rational. We agree with the Association's contention that the amendment actually eliminates the arbitrary aspect of the prior legislation under which Minnesota residents may or may not have had coverage for their plan funds, depending solely upon the arbitrary residence of their plan trustee, over which they have no control. Additionally, the disparate impact results only from the state's legitimate interest in maintaining the welfare of its own citizens, not from arbitrariness or discrimination. Retroactive application does not deprive nonresidents of any rights (except the expectation of coverage based on the arbitrary residence of their trustee), and it does not place any added burdens or liabilities on nonresidents.

To the extent Honeywell argues that this case is fully controlled by *Coombes* and *Ettor*, we also disagree. As already noted, we question the continued vitality of these cases. Furthermore, even assuming they remain authorita-

tive, we conclude that they do not control the outcome in this situation. In our view, *Ettor* and *Coombes* do not stand for the proposition that an inviolable vested right exists whenever a statutory economic right accrues. In *Coombes*, the Court expressly protected what had become a vested contract right, independent of the statute. 285 U.S. at 448, 52 S.Ct. at 438. We have previously concluded that no contract rights are implicated by the 1992 amendment. This case involves legislation of economic matters which exist only by statute and have not been integrated into a private contract, and Honeywell did not even make choices in reliance on the preamendment Act. In *Ettor*, the Court protected a cause of action that provided a remedy for property damage to private property that occurred while the city graded streets for public use. 228 U.S. at 156, 33 S.Ct. at 430-31. In the present case, neither the state nor the Association caused a harm and then took away a remedy for the injury caused, as the city and state did in *Ettor*.

In sum, *Coombes* and *Ettor* are not directly applicable to the case at hand because each involves an element distinguishable from the type of economic legislation at issue here. Thus, even if *Coombes* and *Ettor* apply, they do not dictate a conclusion that accrued economic rights under the preamendment Act rise to the level of a vested right. Rather, in spite of the expectancies that may have been based upon the preamendment Act, the retroactive 1992 amendment was a rational means by which to accomplish the legitimate economic goal of ensuring the welfare of Minnesota resident workers.

III. CONCLUSION

Finding no violation of either the Contract Clause or the Due Process Clause through retroactive application of the 1992 amendment, we affirm the judgment of the district court.

LOKEN, Circuit Judge, with whom BOWMAN, Circuit Judge, joins, concurring.

I concur in Part II.B. of the court's opinion, concluding that the Minnesota statute at issue does not violate Honeywell's right to substantive due process, except to the extent that the rollover paragraph on pages 18 and 19 is inconsistent with my view of the Contract Clause issue. As to that issue, I respectfully disagree with the court's conclusion that no contract has been impaired, but I agree that there has been no *unconstitutional* impairment. Accordingly, I concur in the court's decision to affirm.

As the court explains, the modern Contract Clause analysis is (1) has the State impaired a contract, (2) is the impairment substantial, and (3) is the statute nevertheless a permissible exercise of the State's police power. *See General Motors v. Romein*, 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L.Ed.2d 328 (1992); *Energy Reserves, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410, 103 S.Ct. 697, 703-04, 74 L.Ed.2d 569 (1983). The latter two factors are interrelated. "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245, 98 S.Ct. 2716, 2723, 57 L.Ed.2d 727 (1978).

1. Was There a Contract. My starting point on this question is *Coombes v. Getz*, 285 U.S. 434, 440-42, 52 S.Ct. 435, 435-36, 76 L.Ed. 866 (1932), in which California repealed a constitutional provision holding corporate directors personally liable to creditors for embezzled or misappropriated corporate funds. In holding that the repeal unconstitutionally impaired a creditor's contract with a corporation, the Court described the repealed liability as "in its nature contractual." Justice Cardozo in dissent observed that to call the liability contractual was "a legal fiction . . . borrowed from the law of quasi contracts." But he nonetheless agreed that the Contract Clause may protect a creditor's "contract with a corporation secured in certain contingencies by a statutory liability."

To me, *Coombes* confirms that a statute may create a contract between private parties that the Contract Clause protects. *See also Steamship Co. v. Joliffe*, 2 Wall. 450, 69 U.S. 450, 456-57, 17 L.Ed. 805 (1864) (statute created contract between shipping company and harbor pilots); *Hawthorne v. Calef*, 2 Wall. 10, 69 U.S. 10, 22, 17 L.Ed. 776 (1864) (statute providing that stock is security for railroad's creditors created contract between creditors and shareholders). All recent Supreme Court cases analyzing whether a statute had created a contract for Contract Clause purposes dealt with obligations of the State, rather than, as in *Coombes*, obligations the State has compelled private parties to assume. But that should not alter the analysis. For example, even if a statute mandates the terms of a fire insurance policy, the policy is still a contract. *Accord In re Workers' Compensation Refund*, 46 F.3d 813, 818 (8th Cir.1995).

In this case, the statute created the Guaranty Association, a private non-profit entity consisting of all insurers wishing to do business in the State, and required that entity to guarantee the "covered policies" of its members in the event of an insolvency. That third party guaranty looks much like the statutory liability in *Coombes*. "In determining whether a particular statute gives rise to a contractual obligation, it is of first importance to examine the language of the statute." *National R.R. Passenger Corp. v. Atchison, Topeka & S.F. Ry.*, 470 U.S. 451, 466, 105 S.Ct. 1441, 1452, 84 L.Ed.2d 432 (1985). Here, the statute uses the word "guaranty" in its title and provides that the Association "shall . . . guarantee, assume, or reinsure" the obligations of its members. Minn.Stat. § 61B.06, subd. 1 (1986). A guaranty is a contract under Minnesota law. *See Baker v. Citizens State Bank of St. Louis Park*, 349 N.W.2d 552, 557-58 (Minn.1984). In these circumstances, Honeywell has had a "contract" impaired, either its underlying investment contracts with ELIC or, more directly, the guaranty by the Guaranty Association. The contrary conclusion of the Minnesota Supreme Court, though entitled to deference in its con-

struction of state law, is not binding on us for Contract Clause purposes. *See Romein*, 503 U.S. at 187, 112 S.Ct. at 1110.

2. Was the Contract Substantially Impaired. Total destruction of a contract is a substantial impairment. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 431, 54 S.Ct. 231, 237, 78 L.Ed. 413 (1934). At first glance, this case seems to involve total destruction of the guaranty rights of non-resident Honeywell employees. But that ignores the nature of the guaranteed contracts. As a GIC trade association monograph explained, GICs are assets of the pension plan. Individual employees do not own any part of a GIC, nor do employees have any individual rights under the contract." Thus, properly viewed, the impairment is partial—a reduction in the Association's guaranty obligation to the Honeywell Plan. (Whether that loss to the Plan must ultimately be borne only by non-resident beneficiaries is an issue not before us.)

Though partial, the impairment is quantitatively substantial—based on the percentage of non-resident Honeywell employees, the statutory amendment deprived the Plan of some 75% of its guaranty claim against the Association. In addition, the impairment was not merely incidental to another legislative purpose; the statute was enacted to impair. *Compare Energy Reserves*, 459 U.S. at 418, 103 S.Ct. at 708; *Exxon v. Eagerton*, 462 U.S. 176, 194 n. 14, 103 S.Ct. 2296, 2307, 76 L.Ed.2d 497 (1983).

Beyond the sheer magnitude of an impairment, the Supreme Court looks at whether the impaired term was central to the contract, whether settled expectations have been disrupted, and whether the impaired right was reasonably relied on. *See El Paso v. Simmons*, 379 U.S. 497, 514, 85 S.Ct. 577, 586-87, 13 L.Ed.2d 446 (1965); *Spannaus*, 438 U.S. at 243 n. 14, 98 S.Ct. at 2722 n. 14. In general, when an industry is heavily regulated, parties are considered to have less reasonable expectation that

legislation will not alter their contractual arrangements. *See Energy Reserves*, 459 U.S. at 411, 103 S.Ct. at 704. These other factors cut against the substantiality of this impairment. As in *Veix v. Sixth Ward Bldg. & Loan Ass'n of Newark*, 310 U.S. 32, 38, 60 S.Ct. 792, 794-95, 84 L.Ed. 1061 (1940), the industry is both heavily regulated and "regulated in the particular to which [Honeywell] now objects," since the State created the impaired guaranty. Honeywell cannot show substantial reliance on the Association's guaranty when it purchased the GICs in 1988 because the Association has broad power to unilaterally impose conditions on its guaranty obligations, subject to the Commissioner's approval, including the power to declare a moratorium on payments. *See* Minn. Stat. § 61B.06, subds. 1-3 (1986); *Honeywell v. Minnesota Life & Health Ins. Guar. Ass'n*, 518 N.W.2d 557, 563 (Minn. 1994).

On the other hand, recent Eighth Circuit cases have looked unfavorably on retroactive legislation impairing contracts, even in heavily regulated industries. *See Workers' Compensation Refund*, 46 F.3d at 820 (statute confiscating excess reinsurance premiums invalid though reinsurance plan documents incorporated changes in state law); *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383, 384 (8th Cir.), (statute retroactively restricting franchisor termination rights invalid), *cert. denied*, —— U.S. ——, 115 S.Ct. 613, 130 L.Ed.2d 522 (1994); *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare*, 742 F.2d 442, 451 (8th Cir. 1984) (statute retroactively reducing nursing home rates for medicaid patients invalid "because it disrupts settled and completed financial arrangements under contracts made in reliance on existing law"), *cert. denied*, 469 U.S. 1215, 105 S.Ct. 1191, 84 L.Ed.2d 337 (1985).

On balance, I conclude this impairment is substantial. Honeywell lost 75% of its guaranty benefits. *Cf. Spannaus*, 438 U.S. at 247, 438 U.S. at 239-40 (statute imposing $185,000 pension charge on employer closing

state office was substantial impairment). Thus, on the sliding scale the Supreme Court uses for the last two Contract Clause factors, this impairment requires close scrutiny of the State's justification.

3. Is the Substantial Impairment Justified. The economic interests of a state may justify its impairing contracts, *see, e.g., Blaisdell*, 290 U.S. at 437, 54 S.Ct. at 239-40, but the Contract Clause imposes limits on that power. "Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977). Given the deference paid to state legislatures, especially when the State is not a party to the impaired contract, most claims founder on this aspect of the modern Contract Clause analysis. The Supreme Court looks hard at whether there is a legitimate public purpose and then defers to the legislative judgment as to the reasonableness of a particular remedy. *See Energy Reserves*, 459 U.S. at 412-13, 103 S.Ct. at 704-06.

Of particular importance in this case, the Court has stated that it is reasonable to amend a statute to eliminate unforeseen consequences or windfall benefits, even if that impairs existing contracts. *See U.S. Trust*, 431 U.S. at 31 & n. 30, 97 S. Ct. at 1522 & n. 30; *Energy Reserves*, 459 U.S. at 412, 103 S.Ct. at 704-05. For example, the Court in *U.S. Trust* explained that the amendment in *El Paso* was valid because it simply limited parties "to those gains reasonably to be expected from the [original] contract." Conversely, the amendment struck down in *U.S. Trust* was not in response to windfall benefits or unforeseen consequences because it repealed a provision expressly prohibiting the use of Port Authority revenues for transportation subsidies.

In this case, the Minnesota Legislature based its initial 1977 statute on the NAIC Model Life & Health Guaranty Association Act. The Model Act at that time provided

that the association must guarantee all obligations of an insolvent *domestic* insurer. For an insolvent foreign or out-of-state insurer, however, the association only guaranteed "the covered policies of residents," and it would have "no liability" if that insurer's home State provided "substantially similar" protection "for residents of other states." *See*, Minn.Stat. § 61B.06, subds. 2 and 4 (1986). In other words, if every State had enacted this Model Act and uniformly applied it, the association in an insolvent U.S. insurer's home State would pay *all* guaranty claims. But if an offshore insurer grabbed everyone's money and went under, each State's association would guarantee the covered policies of that State's residents.

In this environment, Honeywell's guaranty claim for its investment in ELIC GICs posed a substantial unforeseen consequence in Minnesota for three reasons. First, the legislators who enacted the initial Minnesota statute in 1977 did not foresee that, unlike regulators in most every other State, Minnesota's Commissioner would take the position in the 1980s, before ELIC became insolvent, that GICs are "covered policies," and the Supreme Court of Minnesota would agree in *Minnesota Life & Health Ins. Guar. Ass'n v. Department of Commerce*, 400 N.W.2d 769, 773-74 (1987). As a result of this lack of uniform implementation, when Honeywell sent its ELIC claims to all fifty States, it received blanket denials from most everyone except Minnesota.

Second, the Legislature did not foresee that "covered policies" would include group annuities in which a single contract holder, rather than thousands of beneficiaries, is the "resident." One can argue that this issue was reasonably foreseeable. But I see no indication that even the drafters of the various Model Acts anticipated the problem before 1985. That the issue was unforeseen is confirmed by the fact that any careful drafter familiar with ERISA insurance-funded group life and health plans would not try to solve this complex an issue with the single word "resident."

Third, Honeywell took the position that the $300,000 statutory ceiling on the Association's liability "for all benefits . . . with respect to any one life," Minn.Stat. § 61B.06, subd. 8 (1986), does not apply to its GIC claims. That exposed the Association to a $111,000,000 claim, far more than any State has allowed in *expressly* covering GICs. *See* Minn.Stat. § 61B.19, subd. 4(6) (1996) ($7,500,000 limit on claims regarding "unallocated annuities of a retirement plan"); 1985 NAIC Model Act § 3(c)(2)(B) ($5,000,000 limit).

Faced with this surprising confluence of factors that produced a genuinely unforeseen consequence and arguable windfall benefit, the Legislature enacted an amendment that reduced the Association's statutory guaranty to a level that Honeywell (or any other plan sponsor) should reasonably have expected from the statute as originally enacted: because GICs are not "covered policies" in California, ELIC's home State, the Minnesota Association must guarantee ELIC's GIC obligations to Minnesota residents; therefore, the Honeywell Plan is entitled to a guaranty benefit equal to that portion of its GIC contracts that represent investments on behalf of its Minnesota resident beneficiaries.

In enacting this amendment, the State acted in furtherance of the legitimate economic interests of its citizens.[3] The effect of its action was to reduce a state-mandated private benefit in a manner not inconsistent with the reasonable expectations of the parties to that "contract." In these circumstances, I concur in the court's conclusion that Minnesota did not unconstitutionally impair the Con-

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[3] As the court observes in its substantive due process discussion, because the Association's liabilities are unfunded—claims are paid by post-insolvency assessments of the remaining, solvent members—it does not take a team of actuaries to deduce that if Minnesota compels the Association to bestow uniquely generous guaranty benefits on the non-Minnesota customers of this year's insolvent insurer, ELIC, the Association's members must eventually recoup those benefits by imposing higher insurance premiums on future Minnesota policyholders.

tract Clause rights of the Honeywell Plan trustee or the Plan's ultimate employee beneficiaries.

RICHARD S. ARNOLD, Chief Judge, with whom McMILLIAN, MAGILL, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges, join, dissenting.

I agree with Judge Loken that a contract was impaired by the Minnesota Legislature's amendment of section 61B. I also believe that impairment was substantial within the meaning of the Contracts Clause, and not sufficiently justified. I therefore respectfully dissent.

The lead opinion holds that there was no contract to be impaired when the Minnesota Legislature amended § 61B to exclude out-of-state-resident life-insurance policyholders and other beneficiaries from its coverage. As Judge Loken's opinion explains, it is settled law that obligations between private parties which are mandated by statute may nonetheless be contractual and enforceable as such. The statute which created the Minnesota Life and Health Insurance Guaranty Association states that the Association was created to protect the rights of policyowners and other beneficiaries by guaranteeing the obligations owed them by insurance companies. Minn.Stat. § 61B.02 subd. 2 (1990) ("The purpose of sections 61B.01 to 61B.16, is to protect policyowners, death benefit certificate holders, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts and supplemental contracts. . . ."). The duty to guarantee the obligations of member insurance companies appears to be the Association's primary reason for existence. The power to collect assessments from member companies exists to enable the Association to fulfill that duty. A guaranty is itself a kind of contract, an undertaking to fulfill the obligation of another if that other is in default.

It seems improbable that the Legislature would create a separate, nonprofit legal entity and endow it with the

power to collect assessments from member insurance companies without demanding reciprocal performance from the Association. The words of the statute belie such a possibility: "If a domestic insurer is an impaired insurer [unable to meet its obligations to policyholders and other beneficiaries], the association shall . . . guarantee, assume, or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of the impaired insurer. . . ." Minn.Stat. 61B.06 subd. 1(b); see also § 61B.06 subd. 2 (pertaining to foreign insurers). The lead opinion today holds the Association did not owe a contractual duty to guarantee all covered policies because a legislature must exhibit a clear indication that it intends to bind itself contractually before it will be considered to be so bound. The Legislature in the instant case did not bind itself, however, it bound the Association. The Legislature created the Association to collect membership fees from insurance companies and to assume the obligations of those companies should they become "impaired." I therefore agree with Judge Loken that the obligations owed by the Association, even though their origin is in the statute, are nonetheless contractual and not merely "statutory."

It follows that the Minnesota Legislature's amendment of the statute was an impairment of a contract. Two sets of contractual relationships were impaired by the Legislature's action: that between Honeywell's trustee and the Association, and that between the trustee and ELIC. The former is affected because the Association, under the amended statute, is released from most of its duty to guarantee the obligation owed the trustee. The latter is affected because the trustee contracted with ELIC under the prior version of the statute, and consequently under the assumption that the GICs were fully guaranteed by the Association.

Judge Loken's concurring opinion concludes that there was only a partial destruction of the contract in this case, because the amendment merely diminished the Associa-

tion's obligation to guarantee the GICs, rather than destroying that obligation completely. As Judge Loken recognizes, a substantial impairment need not be a total destruction to violate the Contracts Clause. I agree that the impairment in this case was substantial. Indeed, the Minnesota Legislature chose which investments to protect and which to abandon at the level of the individual, according to the individual's state of residence. It specifically intended to abrogate the Association's duty to guarantee a given obligation based on the individual investor to whom that duty was owed. It therefore seems appropriate to view the Legislature's action as a complete destruction of those individual contractual relationships.

The Supreme Court has held that the Constitution does not prevent a legislature from working a substantive change in the law, and impairing contracts thereby, as long as it had sufficient justification for doing so. "[L]egislation adjusting the rights and responsibilities of contracting parties" will not violate the Contracts Clause if it is created "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Allied Structural Steel v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978) (internal quotation omitted).

One possible justification for the amendment could be to avoid unforeseen consequences or windfall benefits. Under that view, the Legislature could not have foreseen that Minnesota's Association would be the only one which guaranteed GICs as "covered policies." To the contrary, it was not only foreseeable, but readily ascertainable, that other states did not treat GICs the way Minnesota did. Minnesota's Commissioner and its State Supreme Court both came to that conclusion in the 1980s.

Minnesota also, it is argued, could not have intended to guarantee coverage of policies based simply on the residence of a trustee. The coverage mandated by such a rule, the argument continues, is far more expansive than

the Legislature could have anticipated. Perhaps the Legislature did not anticipate that the Association would incur such a large obligation. But it should have; the language of the statute is not so ambiguous that such a reading should be surprising. Under the subdivision which applies to out-of-state impaired insurers, the statute requires the Association to "guarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured, the covered policies of residents, and shall make or cause to be made prompt payment of the impaired insurer's contractual obligations which are due and owing to residents." Minn.Stat. § 61B.06 subd. 2. It was clear when Honeywell applied for coverage of its ELIC GICs that GICs were already "covered policies" in Minnesota. The ambiguity is allegedly whether "residents" could foreseeably have included a trustee which held several "covered policies" on behalf of both resident and non-resident beneficiaries. The statute defines "resident" in § 61B.03: " 'Resident' means any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed." "Person," according to the statute, "means any individual, corporation, partnership, association or voluntary organization." Minn.Stat. § 61B.03 subd. 12-13. The drafters should have realized that individual corporations, partnerships, associations, and voluntary organizations could hold numerous covered policies on behalf of employees or other beneficiaries. I therefore cannot agree that the Legislature's amendment of the statute is justified because of unforeseeable consequences.

That the amendment imposed a retroactive change raises the "hurdle" the state must clear in order to justify a substantial impairment of contracts. Legislation which makes prospective changes affecting private contracts is an appropriate and commonplace legislative function; private contracting parties, especially in regulated industries, should expect that laws and regulations may change and affect their future dealings. We examine the state's justification for retroactive changes more carefully because the

opposite is generally true: private contracting parties should and do expect that the conditions under which they contracted will remain in effect unless and until there is a change. They do not normally expect lawmakers to change the basic assumptions underlying those agreements so as to affect legal obligations incurred, or rights vested, in the past. See *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Pub. Welfare,* 742 F.2d 442, 450-51 (8th Cir.1984) (upholding prospective change but striking down retroactive change because it "disrupt[ed] settled and completed financial arrangements under contracts made in reliance on existing law"), *cert. denied,* 469 U.S. 1215, 105 S.Ct. 1191, 84 L.Ed.2d 337 (1985); *Holiday Inns Franchising, Inc. v. Branstad,* 29 F.3d 383, 385 (8th Cir.) (observing that retroactive changes which alter prior contractual relationships have "almost uniformly been declared unconstitutional," and "this is a datum on which [parties] are presumably allowed to rely while bargaining"), *cert. denied,* —— U.S. ——, 115 S.Ct. 613, 130 L.Ed.2d 522 (1994).

The Minnesota Legislature in this case deliberately effected a retroactive change in the law to allow the Association to avoid a $110 million payout. The Minnesota Supreme Court has held that the Legislature's amendment was a change, and not a clarification of the statute. *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n,* 518 N.W.2d 557, 562 (Minn.1994). The Legislature's action was a deliberate, retroactive change in the law which altered the settled contractual duties of the Association, and greatly impaired Honeywell's right to payment. The size of the payout, while substantial, does not seem to me to provide sufficient justification for the change. Indeed, the large size of the payout serves only to underscore the substantiality of the obligation that the Legislature has nullified.

Many reasons underlay the determination of the Framers to create a new Constitution. Perhaps none was more

prominent than their conviction that States should not be allowed to destroy or water down contracts for the payment of money. The Contracts Clause "was perhaps the strongest single constitutional check on state legislation during our early years as a Nation. . . ." *Allied Structural Steel Co. v. Spannaus, supra,* 438 U.S. at 241, 98 S.Ct. at 2720-21 (footnote omitted). I regret that this Court today shrinks from enforcing this part of the Constitution, which is designed to safeguard a basic human right, the right to make private contracts. It is not a coincidence that most of the people injured by this statute cannot vote for the Minnesota Legislature.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No 95-1754

HONEYWELL, INC.; HONEYWELL PENSION AND RETIREMENT COMMITTEE, on their own behalf and on behalf of the Honeywell Retirement Investment Plan; INVESTMENT PLUS PLAN OF HONEYWELL, INC.; HONEYWELL RETIREMENT SAVINGS PLAN; FIRST TRUST NATIONAL ASSOCIATION,

Plaintiffs-Appellants,

v.

MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION,

Defendant-Appellee.

Submitted Nov. 16, 1995
Decided June 10, 1996

Rehearing and Rehearing En Banc Granted;
Opinion and Judgment Vacated
Aug. 27, 1996

Before HANSEN, JOHN R. GIBSON, and MURPHY, Circuit Judges.

HANSEN, Circuit Judge.

The plaintiffs (collectively referred to as Honeywell) appeal the district court's [1] grant of summary judgment for the defendant, Minnesota Life and Health Insurance Guaranty Association (the Association), in this declaratory judgment suit. At issue is whether an amendment to a Minnesota statute, which amendment applies retroactively, violates either the Contract Clause or the Due Process Clause of the Constitution of the United States. The district court granted the Association's motion for summary judgment and dismissed Honeywell's complaint, concluding that the amendment passes constitutional muster. We affirm.

I. BACKGROUND

Honeywell, Inc. is a Delaware corporation with its principal place of business in Minnesota. Honeywell sponsors certain defined contribution benefit and retirement plans for its employees. These plans include the Honeywell Retirement Investment Plan, the Investment Plus Plan of Honeywell Inc., and the Honeywell Retirement Savings Plan. The current trustee of the Honeywell plans is First Trust National Association, which has its principal place of business in Minnesota.

The Association is a nonprofit Minnesota corporation created pursuant to the Minnesota Life and Health Insurance Guaranty Association Act (the Act), Minn.Stat. Ann. §§ 61B.01-61B.16 (West 1986).[2] The Association exists to protect the contractual rights of policy owners and beneficiaries of life insurance policies, health insurance

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[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

[2] This Act has been repealed and was replaced in 1993 with Minn. Stat. Ann. §§ 61B.18-61B.32 (West Supp.1996). The legislature provided, however, that §§ 61B.01-61B.16, as amended in 1992, remain applicable to the subject of this suit. *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Assoc.*, 518 N.W.2d 557, 558 n. 4 (Minn.1994). The issue in this case deals with a 1992 amendment to the Act, and not the new 1993 version of the Act.

policies, and annuity contracts (subject to certain definitions and limitations), when the insurer that issued the life insurance, health insurance, or annuity contract becomes financially unable to perform its obligations. *See* Minn. Stat. Ann. § 61B.02, subd. 2. *See also Minnesota Life & Health Ins. Guar. Assoc. v. Department of Commerce,* 400 N.W.2d 769, 770 (Minn.Ct.App.1987). To provide this protection, all insurance companies that deal in life, health, and annuity contracts and elect to do business in Minnesota are required to join and contribute to the Association. *Minnesota Life,* 400 N.W.2d at 770. The dispute in this case arose following the 1991 insolvency of an out-of-state member insurance company and the 1992 enactment by the Minnesota legislature of an amendment that retroactively redefines the term "contractual obligation" under the Act.

In 1988, the Honeywell plans' trustee, who was a Minnesota resident (as is the current trustee), invested in Guaranteed Investment Contracts (GICs) issued by Executive Life Insurance Company of California (ELIC), a member of the Association. GICs are unallocated annuity contracts, or annuity contracts "not issued to or owned by a named individual." *Id.* GICs are investments made by the trustee for the benefit of the plan participants and are considered covered policies under the Act. *See id.* at 775 (holding that GICs are covered annuities under Minn.Stat. § 61B.03, subd. 3 (1984)). The Honeywell GICs expressly name the Honeywell trustee as the policy owner, and not the individual plan participants for whom the investment was made. *Honeywell,* 518 N.W.2d at 561.

In 1991, ELIC became insolvent and unable to fulfill its contractual obligations on the Honeywell GICs, which amounted to $111,000,000. By letter dated January 10, 1992, the Honeywell trustee, as the resident policy owner, submitted to the Association a claim for guaranty coverage under the Act. Honeywell sought coverage for ELIC's entire obligation to the Honeywell trustee, which would

inure not only to the benefit of Honeywell's 9,000 Minnesota resident plan participants but also to Honeywell's 27,000 nonresident plan participants.

The Association neither granted nor denied Honeywell's claim initially. ELIC's insolvency had also affected approximately 10,000 other Minnesota residents who were employed in Minnesota by other companies whose plan trustees owned GICs but which trustees were *not* Minnesota residents. At that time, the Act required the Association to guarantee the covered policies of "residents" to whom any "contractual obligation" was owed from an out-of-state insurer. Minn.Stat. Ann. § 61B.06, subd. 2 (West 1986). *See Honeywell,* 518 N.W.2d at 558. The term "resident," defined as "any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed," Minn.Stat. Ann. § 61B.03, subd. 13 (West 1986), was broad enough to include a trustee who resided in Minnesota. *Honeywell,* 518 N.W.2d at 560-61. The term "contractual obligation," defined as "any obligation under covered policies," Minn.Stat. Ann. § 61B.03, subd. 5 (West 1986), was broad enough to include a GIC obligation owed to a resident trustee. *Honeywell,* 518 N.W.2d at 560-61. Thus, as then codified, the Act, combined with ELIC's insolvency, created the potential that all the Honeywell plan participants, thousands of whom were not residents of Minnesota, might be entitled to coverage under the Minnesota Act because their plan trustee happened to be a Minnesota resident. Whereas, many other Minnesota non-Honeywell employed resident plan participants, who worked for companies whose plan trustee resided in a different state, might not be entitled to any coverage because their trustee (the one to whom the contractual obligation was owed) was not a Minnesota resident.

Faced with this dilemma, on January 21, 1992, the Minnesota Department of Commerce (which supervises and regulates the Association and to whom appeals may be

taken from the Association's determinations, *see* Minn.Stat. Ann. § 61B.09(c)), issued an opinion, advising the Association chairman on the coverage problems created by the ELIC insolvency:

> The Department believes it is the clear intent of the Act to cover the people of Minnesota. Accordingly, it is the Department's position that the Guaranty Association Act provides coverage to Minnesota resident employees who are the beneficiaries of defined-contribution pension plans funded by Guaranteed Investment Contracts purchased from Executive Life.
>
> Consistent with that position the Department has determined that non-resident employees of such a plan, regardless of the residency of the trustee or plan sponsor, are not covered under the Act.

(Appellee's App. at GA-59.)

Subsequently, on April 27, 1992, the governor signed into law an amendment to the definition of the term "contractual obligation," in a purported attempt to retroactively "clarify" the statutory coverage in a manner consistent with the Department of Commerce opinion. *Honeywell,* 518 N.W.2d at 562. The 1992 amendment, which specifically applies retroactively, narrowed the definition of "contractual obligation" to specifically *exclude* any obligation owed "to nonresident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the date of impairment." 1992 Minn. Laws, ch. 540. Thus, the amendment expressly provides coverage only to plan participants who are Minnesota residents. In light of the opinion of the Department of Commerce and the retroactive 1992 amendment, the Association took the position that its guaranty obligation to Honeywell covers only those Honeywell plan participants who resided in Minnesota when ELIC became insolvent.

Honeywell then brought an action for declaratory and injunctive relief and monetary damages in Minnesota state court based on the Association's refusal to fully guaranty the whole of the trustee's claim. Honeywell sought a declaration that retroactive application of the 1992 amendment violates both the Contract Clause and the Due Process Clause of the Constitution because Honeywell's entitlement to coverage and payment under the prior statute had fully accrued before the enactment of the 1992 amendment. The Association removed the case to federal district court pursuant to 28 U.S.C. § 1441.

After removal, the parties filed cross motions for summary judgment. The district court ruled in favor of Honeywell, holding that the retroactive abrogation of Honeywell's guaranty coverage rights impermissibly destroyed vested rights in violation of both the Contract Clause and the Due Process Clause of the Constitution. After the Association moved for reconsideration, however, the district court vacated its initial opinion and certified two questions to the Supreme Court of Minnesota: (1) Did the 1992 amendment to the Act's definition of "contractual obligation" effect a substantive change in the Association's obligations or merely clarify existing obligations? (2) Is the annuity contract owner's (the trustee's) right to guaranty payment from the Association a purely statutory right or is it contractual in nature? The Supreme Court of Minnesota ruled on the certified questions, holding that (1) the 1992 amendment to the definition of "contractual obligation" substantively changed the Association's coverage obligations, and (2) the right to payment from the Association is a purely statutory right under state law. *See Honeywell,* 518 N.W.2d at 563.

After the Supreme Court of Minnesota responded to the certified questions, the parties again filed cross motions for summary judgment. This time, the district court granted the Association's motion for summary judgment, concluding that retroactive application of the 1992 amendment did not violate either the Contract Clause or the Due

Process Clause, and dismissed Honeywell's complaint with prejudice. Honeywell appeals.

II. DISCUSSION

Honeywell contends that its preamendment right to insurance guaranty coverage is contractual in nature and that retroactive application of the amendment constitutes the impairment of its contractual rights in violation of the Contract Clause. Honeywell also argues that the 1992 amendment arbitrarily and irrationally destroyed its accrued, vested right to guaranty coverage, in violation of the Due Process Clause. We begin our analysis with the Contract Clause.

A. CONTRACT CLAUSE

The Constitution provides, "No State shall . . . pass any Law impairing the Obligation of Contracts. . . ." U.S. CONST. art. I, § 10, cl. 1. Read literally, this constitutional prohibition bans any interference with contracts, but cases interpreting the clause clearly indicate that this prohibition "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428, 54 S.Ct. 231, 236, 78 L.Ed. 413 (1934). Instead, when a litigant contends that a legislative amendment has impermissibly impaired contractual obligations, our inquiry initially focuses on "whether the change in state law has 'operated as a substantial impairment of a contractual relationship.' " *General Motors Corp. v. Romein*, 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L.Ed.2d 328 (1992) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978)) (other citation omitted). Three basic components are essential to this inquiry: (1) Does a contractual relationship exist, (2) does the change in the law impair that contractual relationship, and if so, (3) is the impairment substantial? *Id.* If we conclude that a substantial impairment of a contractual relationship exists, we must

then carefully examine "the nature and purpose of the state legislation." *Allied Structural Steel Co.*, 438 U.S. at 245, 98 S.Ct. at 2723.

We first consider whether a contractual relationship exists. In this case, the district court certified to the state supreme court the question of whether the Association's guaranty obligation to GIC owners, such as the Honeywell trustee, is a contractual or a statutory obligation. The Supreme Court of Minnesota determined that the right to payment from the Association is a purely statutory right under *state* law. *Honeywell*, 518 N.W.2d at 563. Honeywell first contends that the district court erroneously certified a question of federal constitutional law to the state court.

While federal courts "accord respectful consideration and great weight to the views of the State's highest court," the determination of whether the Act created a contractual obligation "is a federal question for purposes of Contract Clause analysis, and whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment." *Romein*, 503 U.S. at 187, 112 S.Ct. at 1110 (internal quotations omitted). Contrary to Honeywell's assertion, however, the district court did not avoid its duty to determine the constitutional issue by certifying a question to the state supreme court. Instead, the district court gave proper consideration to the state court's views but independently determined that the right to payment under the Act is not contractual within the meaning of the Contract Clause. We review de novo the district court's judgment on this constitutional question. *See United States v. Bates*, 77 F.3d 1101, 1104 (8th Cir.1996).

Our independent review leads us to agree with the district court that the rights at issue are statutory in nature and therefore, no contractual relationship existed between Honeywell and the Association. Two factors lead us to this conclusion: (1) the Act itself does not create a contract, and (2) the GICs do not specifically incorporate the terms of the Act.

First, the Act's guaranty is not itself a contract between the Association and those who qualify for the Act's protection. "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 18 n. 14, 97 S.Ct. 1505, 1516 n. 14, 52 L.Ed.2d 92 (1977). The right to payment under the Act is not enforceable against the state of Minnesota but is an obligation imposed upon the Association. The Association is a nonprofit legal entity and not a state agency. Minn.Stat. Ann. § 61B.04, subd. 1 (West 1986). *See also* Minn.Stat. Ann. § 61B.21, subd. 1 (West Supp.1996). Even if the Association were a state agency, the Act contains no "clear indication that the legislature intends to bind itself contractually," which is necessary in order to overcome the general presumption "that at law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432 (1985) (quotations omitted). Rather, the Act creates an insurance guaranty association with attendant statutory obligations to safeguard the financial well-being of Minnesota residents to whom contractual obligations are owed by its member insurance companies. The Act does not create a contract; instead, it creates a statutory safety net to protect the economic well-being of Minnesota resident policy owners in the event a member insurer becomes insolvent.

Second, while the Association has the power to enter into contracts, Minn.Stat. Ann. § 61B.06, subd. 9(a) (West 1986), the Association is not a party to the GICs involved here. The GICs at issue are contracts between the Honeywell trustee and the impaired ELIC, not the Association. The Honeywell trustee did not specifically bargain for protection under the Act, and the Act is not expressly or impliedly incorporated into the terms of the

GICs. "For the most part, state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts." *Romein*, 503 U.S. at 189, 112 S.Ct. at 1110. The Association's statutory obligation to guaranty the insurance coverage of residents protected by the Act does not in any way affect the validity, construction, or enforcement of ELIC's obligation on the GICs. Moreover, there is no evidence that the GICs were created in pursuance of the statutory obligation. *Cf. Coombes v. Getz*, 285 U.S. 434, 442, 448, 52 S.Ct. 435, 436, 438, 76 L.Ed. 866 (1932) (upholding the contractual liability created pursuant to a state constitutional rule of law that was repealed). The 1992 amendment merely altered definitions under the Act, which in turn affect the Association's statutory obligation to the Honeywell trustee, but the amendment did not alter or affect any bargained-for agreement between the Association and the Honeywell trustee. The Contract Clause does not "protect against all changes in legislation, regardless of the effect of those changes on bargained-for agreements." *Romein*, 503 U.S. at 190, 112 S.Ct. at 1111.

We conclude that the Association's obligations are statutory in nature rather than contractual. Absent the existence of a contractual relationship, our Contract Clause inquiry is finished. The 1992 amendment simply does not implicate the Contract Clause.

B. DUE PROCESS

Honeywell's due process claim presents a closer question. Honeywell argues that retroactive application of the 1992 amendment defeats its vested right to payment under the Act, in violation of the Due Process Clause. Honeywell relies on *Coombes*, 285 U.S. at 439-48, 52 S.Ct. at 435-38, where the Supreme Court held unconstitutional the repeal of a California state constitutional provision that provided a cause of action against corporate directors. The Court stated in absolute terms that "neither

vested property rights nor the obligation of contracts of third persons may be destroyed or impaired." *Id.* at 442, 52 S.Ct. at 436. More specifically, the Court in *Coombes* held, "a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, § 10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution." *Id.* at 448, 52 S.Ct. at 438. Honeywell also relies on *Ettor v. City of Tacoma*, 228 U.S. 148, 158, 33 S.Ct. 428, 431, 57 L.Ed. 773 (1913), where the Supreme Court held that a statutory right to compensation for property damage caused by the city in the course of grading streets, which right to compensation was complete before a repeal of the cause of action, was a vested property right that could not be retroactively destroyed. Claiming that these cases control the outcome of the case at hand, the Honeywell trustee asserts a vested right to payment under the Act as it existed when ELIC became insolvent, prior to the 1992 amendment.

The Association, on the other hand, urges us to follow more recent Supreme Court precedents in which the Court reviews economic legislation with a very deferential eye and does not accord vested rights status to economic rights. The Association observes that under this modern approach, due process is satisfied as long as a reasonable legislative purpose supports the retroactive application of the legislation. The Association contends that the retroactive 1992 amendment is supported by a reasonable legislative purpose, and alternatively, that no vested rights accrued in favor of the Honeywell trustee upon ELIC's insolvency.

In one sense, both arguments are right. The Supreme Court has never expressly overruled the reasoning of *Ettor* and *Coombes*, which accords great protection to accrued statutory causes of action. In the area of economic legislation, however, we cannot ignore the abundance of cases where substantive due process has evolved into a defer-

ential rational basis analysis. We believe that an understanding of the historical context of *Ettor* and *Coombes* is essential to divine accurately the present weight of their authority on the issue before us. *See Hammond v. United States*, 786 F.2d 8, 11 (1st Cir.1986) (questioning the continued vitality of *Coombes* and *Ettor* because recent cases have retroactively abridged economic and real property rights without always carefully distinguishing these prior cases). *See also* W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Cal. L. Rev. 216, 232 (1960) ("The decision [of *Coombes v. Getz*] seems far too rigid in its conception of permissible legislative change and would almost certainly not be followed today.").

Ettor and *Coombes* were decided during what is referred to in the history of American jurisprudence as the *Lochner* era, named for the pivotal case of judicial activism, *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (invalidating maximum work hours legislation as an unconstitutional exercise of police power). Cases of that era frequently invalidated statutes that limited economic autonomy in a manner thought by the Court to be unnecessary or unwise, but in more recent decisions, the Court plainly sees its role differently: "[W]e do not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952). The reasoning prevalent during the "*Lochner* [era] has been implicitly rejected many times." *Whalen v. Roe*, 429 U.S. 589, 597 & n. 18, 97 S.Ct. 869, 875 & n. 18, 51 LEd.2d 64 (1977). *See also United States v. Carlton*, —— U.S. ——, ——-——, 114 S.Ct. 2018, 2023-24, 129 L.Ed.2d 22 (1994) (recognizing that three tax cases from the *Lochner* era "were decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded'" (citation omitted)); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 861, 112

S.Ct. 2791, 2812, 120 L.Ed.2d 674 (1992) (recognizing that the demise of *Lochner* era reasoning began in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937)).

Within two years of the *Coombes* decision, substantive due process analysis in the area of retroactive economic legislation began to be framed in terms of reasonableness, drifting away from the *Lochner* era's strict protection of economic freedom and vested rights. *See Blaisdell*, 290 U.S. at 438, 54 S.Ct. at 240 (upholding as an emergency measure a mortgage moratorium law that impaired obligations on mortgage contracts). The Court acknowledged that even the expressly protected obligation of contracts (and similarly, we believe, the concept of vested rights) may be impaired by economic legislation if "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." *Id.* This rational basis substantive due process test appears to have supplanted the legislatively restrictive vested rights mode of analysis, and allows legislatures more freedom in dealing with economic situations. *See, e.g.*, James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 Cornell L.Rev. 87, 119 (Nov.1993) ("Modern jurists reject the categorical logic of vesting and consider the statute's justifications under the rubric of substantive due process."); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 696-97 (1959-60) (noting that the vested rights analysis has been replaced by balancing three factors: (1) the nature and strength of the public interest served by the statute, (2) the extent to which the statute modifies or abrogates a preenactment right, and (3) the nature of the right altered by the statute).

In 1976, the Court announced, "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that

the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). These authorities leave no doubt that, even though *Coombes* and *Ettor* have never been overruled by the Supreme Court, the modern framework for substantive due process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate governmental purpose. Given the criticism surrounding the Court's *Lochner* era decisions in general, coupled with the development of judicial deference to economic legislation since then, we join those who question the continued validity of the vested rights analysis of *Coombes* and *Ettor* when reviewing the constitutionality of economic legislation, recognizing as we must that only the Supreme Court itself can overrule its precedents. We rely instead on the more recent Supreme Court pronouncements of substantial due process analysis for economic legislation, which articulate a rational basis test.

Our task, then, is to determine whether the retroactive application of the 1992 amendment is justified by a rational legislative purpose, or whether it is illegitimate and arbitrary. Retroactive legislation, like prospective legislation, must meet the reasonableness test of due process. *Usery*, 428 U.S. at 17, 96 S.Ct. at 2893. "But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709 at 2718, 81 L.Ed.2d 601 (1984). Retroactive economic legislation has been upheld as reasonable even in circumstances where it destroys a settled expectancy or imposes a new liability. *See, e.g., Carlton*, —— U.S. at ——-——, 114 S.Ct. at 2022-23 (upholding a curative measure that took away an expected and relied upon deduction for estate tax); *Gray*, 467 U.S. at 734, 104 S.Ct. at 2720 (upholding retroactive application of ERISA's withdrawal liability as supported by rational legislative purpose); *Usery*, 428 U.S. at 19-20, 96 S.Ct. at 2894-95 (upholding retroactive

aspects of Black Lung Benefits Act of 1972, which required employers to compensate former employees disabled by a work-related disease). The Court has repeatedly noted that although certain economic liabilities or burdens were not anticipated, nevertheless, " ' "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." ' " *Concrete Pipe & Prod. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 637, 113 S.Ct. 2264, 2287, 124 L.Ed.2d 539 (1993) (quoting *Gray*, 467 U.S. at 729, 104 S.Ct. at 2718, quoting *Usery*, 428 U.S. at 16, 96 S.Ct. at 2893).

Using these standards, we conclude that the 1992 amendment redefining "contractual obligation" was neither arbitrary nor illegitimate. The state has a legitimate interest in regulating the insurance industry, easing the economic burdens of its own residents, and ensuring the economic life of an association created by its statute to protect its residents. The general purpose of the Act at issue in this case "is to protect the future financial stability of individuals," *Minnesota Life & Health Ins.*, 400 N.W.2d at 773, and the preamendment Act expressly provided protection to "residents" to whom "contractual obligations" are owed. Minn. Stat. § 61B.06, subd. 2 (1986). The 1992 amendment serves to narrow the definition of contractual obligation, explicitly providing coverage only to resident plan participants. This is a legitimate purpose.

The 1992 amendment is also curative in nature, even though it worked a substantive change in the law. *See Honeywell*, 518 N.W.2d at 560-63 (holding that the amendment worked a substantive change in the law because before the amendment, it plainly entitled resident policy owners, including trustees, to coverage). Curative legislation corrects an unintended and unanticipated mistake in the underlying legislation, which went undetected until some time after the original enactment. Certainly, legislatures have the authority to cure inadvertent defects in their legislation. *See Carlton*, —— U.S. at ——, 114

S.Ct. at 2022 (upholding Congress's attempt to cure a defect in the tax code). In *Carlton*, the Court concluded that Congress's purpose in retroactively taking away an estate tax deduction, even though the decedent's executor had relied upon it, was neither illegitimate nor arbitrary because "Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." —— U.S. at ——, 114 S.Ct. at 2023. We also note the observation of one commentator that "the individual who claims that a vested right has arisen from the defect is seeking a windfall since, had the legislature's . . . action had the effect it was intended to and could have had, no such right would have arisen." Hochman, *supra* at 705.

Here, the Minnesota legislature acted reasonably when it gave retroactive effect to the 1992 amendment in order to cure a drafting defect that might have inadvertently left thousands of Minnesota residents without coverage under the Act due to the ELIC debacle. We agree with the observation of the Supreme Court of Minnesota: "Given that unallocated annuity contracts were not prevalent at the time of the statute's enactment in 1977, the legislature likely did not contemplate how the Act specifically applied to these contracts." *Honeywell*, 518 N.W.2d at 561. Absent retroactive effect, an unintended gap in coverage would have left many Minnesota resident workers without coverage, while an unintended windfall in favor of nonresident workers who had a Minnesota trustee would have strained the financial capabilities of the Association and required Minnesota residents to pay higher premiums to finance the Association's obligation to out-of-state residents. In sum, "the interest in the retroactive curing of such a defect in the administration of government outweighs the individual [trustee's] interest in benefiting from the defect." Hochman, *supra* at 705-06. Thus, we conclude that retroactive application of the 1992 amendment was a rational means by which to accomplish the state's legitimate goals.

Honeywell contends that retroactive application is arbitrary and irrational because there is no connection linking the Honeywell trustee to the ELIC failure that triggered coverage and because the amendment has a disparate impact on non-residents. Neither contention has merit. We have already determined that the retroactive application of the amendment was rational and prevented an unanticipated gap in coverage for resident plan participants and an unexpected windfall for nonresident plan participants. Because the context here is curative in nature, there is no need to demonstrate any connection of the Honeywell trustee to the ELIC failure in order for the legislation to be rational. We agree with the Association's contention that the amendment actually eliminates the arbitrary aspect of the prior legislation under which Minnesota residents may or may not have had coverage for their plan funds, depending solely upon the arbitrary residence of their plan trustee, over which they have no control. Additionally, the disparate impact results only from the state's legitimate interest in maintaining the welfare of its own citizens, not from arbitrariness or discrimination. Retroactive application does not deprive nonresidents of any rights (except the expectation of coverage based on the arbitrary residence of their trustee), and it does not place any added burdens or liabilities on nonresidents.

To the extent Honeywell argues that this case is fully controlled by *Coombes* and *Ettor*, we also disagree. As already noted, we question the continued vitality of these cases. Furthermore, even assuming they remain authoritative, we conclude that they do not control the outcome in this situation. In our view, *Ettor* and *Coombes* do not stand for the proposition that an inviolable vested right exists whenever a statutory economic right accrues. In *Coombes*, the Court expressly protected what had become a vested contract right, independent of the statute. 285 U.S. at 448, 52 S.Ct. at 438. We have previously concluded that no contract rights are implicated by the 1992

amendment. This case involves legislation of economic matters which exist only by statute and have not been integrated into a private contract, and Honeywell did not even make choices in reliance on the preamendment Act. In *Ettor*, the Court protected a cause of action that provided a remedy for property damage to private property that occurred while the city graded streets for public use. 228 U.S. at 156, 33 S.Ct. at 430-31. In the present case, neither the state nor the Association caused a harm and then took away a remedy for the injury caused, as the city and state did in *Ettor*.

In sum, *Coombes* and *Ettor* are not directly applicable to the case at hand because each involves an element distinguishable from the type of economic legislation at issue here. Thus, even if *Coombes* and *Ettor* apply, they do not dictate a conclusion that accrued economic rights under the preamendment Act rise to the level of a vested right. Rather, in spite of the expectancies that may have been based upon the preamendment Act, the retroactive 1992 amendment was a rational means by which to accomplish the legitimate economic goal of ensuring the welfare of Minnesota resident workers.

III. CONCLUSION

Finding no violation of either the Contract Clause or the Due Process Clause through retroactive application of the 1992 amendment, we affirm the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-93-260

HONEYWELL INC., and the HONEYWELL PENSION & RETIREMENT COMMITTEE on their own behalf and on behalf of the Honeywell Retirement Investment Plan, INVESTMENT PLUS PLAN of HONEYWELL, INC., and the HONEYWELL RETIREMENT SAVINGS PLAN, and FIRST TRUST NATIONAL ASSOCIATION,

Plaintiffs,

v.

MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION,

Defendant.

MEMORANDUM OPINION AND ORDER

INTRODUCTION

Plaintiffs Honeywell Inc. and the Honeywell Pension & Retirement Committee on their own behalf and on behalf of the Honeywell Retirement Investment Plan, Investment Plus Plan of Honeywell, Inc., and the Honeywell Retirement Savings Plan, and First Trust National Association (collectively "Honeywell") commenced this action seeking declaratory and injunctive relief in connection with a claim Honeywell filed with the Minnesota Life and Health Insurance Guarantee Association ("the Association"). Honeywell claimed payment from the Association for obligations owed by Executive Life Insurance

Corporation ("ELIC") under Guaranteed Investment Contracts ("GICs"), purchased to fund Honeywell's retirement and pension plans.

In 1993, both parties moved for summary judgment on the issue of the Association's payment obligations under 1992 amendments to the Minnesota Life and Health Insurance Guarantee Association Act. The Court granted Honeywell's motion as to Counts III, IV, V and VI and otherwise denied the motion. The Court also granted the Association's motion for summary judgment as to the claim that the 1992 amendment to Minnesota Statute section 61B.06, subd. 7(a) is valid, and in all other respects denied the motion.

By Order dated December 6, 1993, the Court vacated the portion of its previous order granting partial summary judgment to Honeywell, and denied without prejudice Honeywell's and the Association's cross-motions for summary judgment on Counts III, IV, V and VI.[1]

The Court then certified two questions to the Minnesota Supreme Court, staying all proceedings pending resolution of those questions. Following the supreme court's decision on the certified questions, the parties again filed cross-motions for summary judgment. Those motions are now before the Court.

BACKGROUND

I. The Act and the Amendment

The Minnesota Life and Health Insurance Guarantee Association Act ("the Act") created the Association as a mechanism to guaranty the obligations of insolvent insurers for the protection of the public. Minn. Stat. § 61B.01-.16 (1992). The Association is funded with

[1] The amendment to section 61B.06, subdivision 7(a) (the "subrogation amendment") was upheld in this Court's September 22, 1993 Order. This ruling was not vacated by the Court and remains the law of the case.

premiums paid by member insurers, who must join the Association as a prerequisite to transacting insurance business in Minnesota.

Pursuant to the Act, when a foreign insurer is placed under an order of liquidation, rehabilitation, or conservation, the Association

> shall, subject to any conditions imposed by the association and approved by the commissioner, guarantee, assume or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of residents, and shall make or cause to be made prompt payments of the impaired insurer's contractual obligations which are due and owing to residents.

Minn. Stat. § 61B.06, subd. 2. The Act defines "resident" as "any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed." *Id.* § 61B.03, subd. 13. The term "person" is defined as "any individual, corporation, partnership, association or voluntary organization." *Id.* § 61B.03, subd. 12. Prior to 1992, the Act defined "contractual obligation" as "any obligation owed under covered policies." *Id.* § 61B.03, subd. 5.

The dispute in this case centers on the Minnesota Legislature's 1992 amendment of the term "contractual obligation" ("the Amendment"). As amended, "contractual obligation" means

> (a) . . . any obligation under covered policies, except as provided in subparagraphs (c) and (d) of this subdivision.
>
> (b) For purposes of this chapter, contractual obligation includes an unallocated annuity contract which funds a qualified defined contribution pension plan pursuant to Internal Revenue Code of 1986, sections 401(k), 403(b) and 457.[2]

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[2] The GICs purchased to fund Honeywell's pension plans are a type of "unallocated annuity contract" included in the Association's

> (c) Notwithstanding the definition of contractual obligation contained in paragraphs (a) and (b), *contractual obligation does not include any obligation to nonresident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the date of impairment.*

1992 Minn. Laws, ch. 540 (emphasis added). The legislature explicitly provided for retroactive application of the Amendment. 1993 Minn. Laws, ch. 540, § 23.

II. The Dispute

In 1988, Honeywell, on behalf of certain retirement and pension plans, invested in GICs issued by ELIC. The assets of the pension plans were owned by a trustee, as required under the Employee Retirement Income Security Act of 1974 ("ERISA"). At all times relevant to this action, IDS Bank and Trust Company ("IDS") served as trustee for the plans, thus owning all ELIC GICs purchased by Honeywell.

In April, 1991, the California Insurance Commissioner placed ELIC into conservatorship. As a result, the pension plan assets invested in ELIC's GICs are currently and indefinitely unavailable to the participants in Honeywell's plans.

On January 10, 1992, Honeywell claimed coverage by the Association for the ELIC GICs. The Association did not respond to this claim. Subsequently, in April 1992, the Amendment to the Act was signed into law. The Amendment negatively affected Honeywell's pending claim for payment under the Act, as it excludes from

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contractual obligations under the Act. *See Minnesota Life & Health Ins. Guar. Ass'n v. Department of Commerce*, 400 N.W.2d 769, 770, 774 (Minn. Ct. App. 1987).

coverage by the Association the contractual obligations owed to a trustee who owns the contract. Honeywell claims that retroactive application of the Amendment to defeat its pending claim against the Association violates the Contract and Due Process Clauses of the federal and state constitutions.

III. Certification to the Minnesota Supreme Court

The Court initially agreed with Honeywell that retroactive application of the Amendment was unconstitutional. The Court concluded that prior to the 1992 Amendment Honeywell had a vested right in coverage under the Act which could not be defeated retroactively. The Court therefore granted summary judgment to Honeywell on its constitutional claims in its September 22, 1993 Order. Subsequently, the Court vacated that Order and denied without prejudice the parties' cross-motions for summary judgment.

Finding that the action involved questions of Minnesota law which could be determinative of the matter, the Court then certified the following two questions to the Minnesota Supreme Court:

> 1) Did the 1992 amendment to the Act's definition of "contractual obligation," to wit:
>
> > c) Notwithstanding the definition of contractual obligation contained in paragraphs (a) and (b), contractual obligation does not include any obligation to nonresident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the date of impairment * * *
>
> 1993 Minn. Laws, ch. 540 § 5(c), *codified at* Minn. Stat. § 61B.03, subd. 5(c) (1992), clarify the Asso-

ciation's coverage obligations under the Act or effect a substantive change in those obligations?

2) Is the right to payment created in favor of annuity contract owners in Minn. Stat. § 61B.06, subd. 2 a purely "statutory" right or a right that is "contractual" in nature?

In addressing whether the Amendment effected a substantive change in the law, the supreme court first analyzed the pre-Amendment obligations of the Association. The court began with the requirement of the pre-1992 Act that the Association guarantee the covered policies of residents. *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n.*, 518 N.W.2d 557, 561 (Minn. 1994). The court noted that unallocated annuity contracts are covered policies under the Act. Under ERISA, the unallocated annuity contracts must be held by a plan trustee. The GICs issued on behalf of Honeywell explicitly provide that the trustee, IDS, "owns" the contracts. *Id.* Further, the court found, the Act defines "resident" as a person who resides in the state at the time of the impairment; "person" in turn is defined broadly to include a corporation. Thus, the supreme court held, prior to 1992 the Act unambiguously required the Association to provide coverage to resident trustees, such as IDS, who own unallocated annuity contracts, such as GICs. *Id.*

The supreme court then compared the language of the 1992 Amendment, finding that it obligated the Association to provide coverage "solely to resident plan participants who are the beneficiaries of unallocated annuity contracts." *Id.* at 562. The court concluded that the Amendment, which expressly excludes from coverage a trustee who owns the annuity contract, effected a substantive change in the Act. *Id.*

The supreme court next addressed the question of whether the right of payment in favor of annuity contract owners under the Act is a purely statutory right or is con-

tractual in nature. The court held that any rights of an annuity contract owner against the Association are purely statutory. *Id.* at 563. The court noted that the Association's obligations under the Act are not coextensive with the contractual obligations of the insolvent insurer. Further, as opposed to a voluntary assumption of obligations in the nature of a contract, the Act requires member insurers to join the Association as a condition of doing business in the state. Therefore, the court concluded, the rights of annuity contract owners in Minnesota against the Association are solely statutory. *Id.*

Upon resolution of these questions by the Minnesota Supreme Court, Honeywell and the Association again moved for summary judgment on the constitutionality of the 1992 Amendment.

DISCUSSION

I. Legal Standard

Under Federal Rule of Civil Procedure 56, a moving party is entitled to summary judgment if the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If, based upon the evidence, a reasonable jury could not return a verdict for the non-moving party, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As with the parties' initial cross-motions, the issues presently to be decided on summary judgment are questions of law. Determination of the constitutionality of the 1992 Amendment to the Act will resolve the central dispute in this case.

II. Due Process

Economic legislation carries a presumption of constitutionality; the "burden is on one complaining of a due process violation to establish that the legislature has acted

in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The highly deferential standard accorded economic legislation applies equally to the retroactive application of a statute. *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). As the Supreme Court has stated, "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Id.* Although the retroactive application of a statute must satisfy the due process test, "that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative basis." *Id.* at 730.

A. Vested or Inchoate Rights

Honeywell contends that even under this deferential standard, retroactive application of the Amendment violates due proces because it divests Honeywell of private vested rights.

Typically, rights in an existing law remain inchoate and do not vest prior to final judgment. *Holen v. Minneapolis-St. Paul Metro. Airports Comm'n*, 84 N.W.2d 282, 287 (Minn. 1957); *McClelland v. McClelland*, 393 N.W.2d 224, 227 (Minn. Ct. App. 1986), *rev. denied*, (Minn. 1986). As the Minnesota Supreme Court stated in *Holen*,

> When the legislature changes the law while a case is pending, but prior to the rendition of judgment, the court may not perpetuate the old law but must apply the new. There is no vested right in an existing law nor in an action until *final* judgment has been entered therein. An appeal suspends a judgment and deprives it of its finality, and that lack of finality continues until the appeal is dismissed or until the appellate court has pronounced its decision. Since a court has no power to perpetuate a rule of law which

> the legislature has either changed or repealed, it follows that amendatory or curative legislation, though enacted after the rendition of a judgment and pending the appeal, must govern the final disposition of the case upon appeal.

Id. In certain cases, however, rights created by statute "vest" regardless of whether final judgment has been entered and cannot be abridged by the retroactive application of a statute. *Hammond v. United States*, 786 F.2d 8, 11 (1st Cir. 1986). Such a situation arises, as Honeywell contends happened here, where contractual rights vest in a party independent of the statute which created them. Contractual rights which fully have accrued may not be divested by subsequent legislation. *Coombes v. Getz*, 285 U.S. 434, 442 (1932).

The *Coombes* case, heavily relied upon by Honeywell, involved an amendment to a state constitution during the pendency of an appeal. The amendment repealed a provision of the constitution imposing liability upon corporate directors for the misappropriation of money by officers of the corporation. *Id.* at 435. The repeal defeated Coombes' cause of action, which had not been perfected by final judgment. The United States Supreme Court held that the constitutional rule of law had created contractual liability independent of the provision which created the law. This contractual right had vested prior to the repeal and could not retroactively be destroyed. *Id.* at 442.

In contrast to the plaintiff in *Coombes*, Honeywell had no vested right to coverage under the Act prior to the 1992 Amendment. The Minnesota Supreme Court explicitly held, and this Court concurs, that any rights held by Honeywell against the Association were purely statutory. *Honeywell*, 518 N.W.2d at 563. The Association's payment and guarantee obligations arise solely from the Act. Significantly, these statutory obligations are not coextensive with the contractual obligations of the insolvent insurer. Section 61B.06, subd. 2 of the Act provides that

the Association's responsibilities are "subject to any conditions imposed by the association and approved by the commissioner." Further, the Act limits the Association's aggregate liability and the Commissioner may reduce the Association's statutory obligations. Minn. Stat. § 61B.06, subd. 8 and 3. Here, unlike the voluntary acts involved by the parties in *Coombes*, "[n]o act was contemplated on [the Association's] part by way of assumption of an obligation in order to fix the liability." *See Coombes*, 285 U.S. at 448. Rather, the Act mandated the Association members to join the Association as a requirement of transacting insurance business in Minnesota. The accompanying obligations were statutorily imposed. *Honeywell*, 518 N.W.2d at 563.

Because Honeywell's rights arose exclusively from the Act and did not "stand independent of the statute that created them," they had not "vested" prior to the 1992 Amendment. *Hammond*, 786 F.2d at 11. Thus, the rights against the Association remained inchoate pending final judgment. *See Id.* at 12 (" 'No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.' . . . This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained.") (quoting *New York Central R.R. Co. v. White*, 243 U.S. 188, 198 (1917)). *See also In re Q Petroleum*, 498 N.W.2d 772, 782 (Minn. Ct. App. 1993) (amendment retroactively removing right of insured persons to recover cleanup costs from the Petroleum Tank Release Cleanup Account did not impair vested rights in violation of Due Process Clause); *Zucker v. United States*, 758 F.2d 637, 639 (Fed. Cir.) (no legitimate claim to retirement benefits which are dependent on a statutory right), *cert. denied*, 474 U.S. 842 (1985).

The Court's conclusion that Honeywell had no vested rights against the Association is supported by several post-*Coombes* decisions upholding legislation which retroactively abridged economic rights created by statute.

In *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, for example, the Supreme Court upheld legislation which retroactively penalized employers who withdrew from multiemployer pension plans. 467 U.S. at 734. The Multiemployer Pension Plan Amendments Act ("MPPAA") created the Pension Benefit Guaranty Corporation ("PBGC") to provide benefits to pension plan participants whose plans terminate with insufficient funds to pay the expected benefits. Prior to the enactment of the statute, certain provisions took effect which imposed liability upon employers withdrawing from multiemployer pension plans. *Id.* at 720-25.

The plaintiff employer argued that retroactive withdrawal liability violated the Due Process Clause. The Supreme Court, noting the strong deference accorded economic legislation, upheld the retroactive application against the constitutional challenge. The Court found the retroactive application justified by the rational legislative purpose of dissuading employers from withdrawing from the pension plans and thus protecting the stability of the plans themselves. *Id.* at 730-31. The Court stated, " 'our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.' " *Id.* at 729-30 (quoting *Usery*, 428 U.S. at 15-16). *See also General Motors Corp. v. Romein*, 112 S. Ct. 1105, 1112 (1992) (upholding against Due Process and Contract Clause challenges a retroactive provision requiring employers to reimburse employees for disability benefits withheld prior to the statute's effective date).

Because Honeywell held no vested rights against the Association prior to the 1992 Amendment, the retroactive application of the Amendment will not be held to violate due process if it was supported by a rational legislative purpose.

B. Rational Legislative Purpose

Honeywell argues that even if its rights had not vested prior to the Amendment, the Amendment still violates due process because it was arbitrary and irrational. As stated above, economic legislation, including the retroactive application of a statute, carries a presumption of constitutionality and will be upheld if it serves a legitimate legislative purpose furthered by rational means. *Gray*, 467 U.S. at 729. The Association contends that the Minnesota Legislature passed the 1992 Amendment to avoid an unanticipated consequence of the Act in the context of unallocated annuity contracts. Specifically, the Association argues, the Amendment sought to protect resident plan participants and avoid an unintended windfall for non-residents in the application of the Act to pension GICs. Several Supreme Court cases are instructive in determining whether the Amendment served a rational legislative purpose.

Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 113 S. Ct. 2264 (1993), involved the same employer withdrawal liability imposed by the Multiemployer Pension Plan Amendments Act at issue in *Gray*. The MPPAA imposed liability on employers withdrawing from a multiemployer pension plan for a share of the plan's unfunded vested benefits. Concrete Pipe argued that because none of its employees had earned vested benefits through Concrete Pipe prior to its withdrawal from the plan, the liability for the unfunded vested benefits lacked a rational relationship to its past contributions. *Id.* at 2287.

The Court upheld the legislation, stating, "under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means." *Id.* at 2288. *See also United States v. Carlton*, 114 S. Ct. 2018, 2023 (1994) (upholding retroactive tax legislation, which altered taxpayer's expectations,

adopted as a curative measure for significant and unanticipated revenue loss under the pre-amendment tax code).

In the present case, the 1992 Amendment satisfies the due process requirement of rationality. The legislature amended the Act to assure protection for Minnesota resident plan participants. As the Minnesota Supreme Court found, "[g]iven that unallocated annuity contracts were not prevalent at the time of the statute's enactment in 1977, the legislature likely did not contemplate how the Act specifically applied to these contracts." *Honeywell*, 518 N.W.2d at 561. The Amendment sought to cure an unanticipated result of the Act. Providing coverage based on the residency of plan participants is a rational means to effectuate the purposes of the Act in the context of the unanticipated pension GICs. Because the Amendment served a legitimate legislative purpose furthered by rational means, the Court holds that the 1992 Amendment to the Act does not violate the Due Process Clause.

III. Contract Clause

Honeywell also contends that the 1992 Amendment impairs its contractual rights in violation of the Contract Clause of the United States and Minnesota Constitutions.[3] The Contract Clause prohibition against the impairment of contracts is not absolute, but "must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983) (citations omitted).

To determine whether a state law violates either the state or federal Contract Clause, courts apply the three-part test articulated in *Energy Reserves, supra.* The

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[3] Article I, section 10 of the United States Constitution provides, "No state shall . . . pass any . . . Law impairing the Obligation of Contracts." Article I, section 11 of the Minnesota Constitution provides, "No . . . law impairing the obligation of contracts shall be passed . . . ."

threshold inquiry is " 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Id.* at 704 (*quoting Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). This inquiry, in turn, has three elements: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Romein*, 112 S. Ct. at 1109.

The Court need only address the first element, whether a contractual relationship exists, as it is dispositive of this issue. *See id.* at 1110. Upon certification by this Court, the Minnesota Supreme Court answered this precise question in the negative: "There exists no contractual relationship between the Association and the annuity contract owners." *Honeywell*, 518 N.W.2d at 563. Although Honeywell correctly points out that whether a contractual relationship exists for purposes of Contract Clause analysis is ultimately a question for this Court, we " 'accord respectful consideration and great weight to the views of the State's highest court.' " *Romein*, 112 S. Ct. at 1110 (quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938)).

As discussed in connection with the due process inquiry concerning vested rights, *supra* pp. 9-13, the Court concurs with the conclusion of the Minnesota Supreme Court that Honeywell's rights under the Act were purely statutory. As noted earlier, the Association's obligations under the statute were not coextensive with those of the insurer whose contractual obligations it assumed. At issue is not the original contract between insurer and insured, but rather the relationship between the Association and the annuity contract owners. The rights and obligations of those parties are created and governed exclusively by statute. As stated by the supreme court, "[t]o the extent an annuity contract owner enjoys any rights against the Association, it is because they are set forth in a statute." *Honeywell*, 518 N.W.2d at 563.

Accordingly, because no contract existed between Honeywell and the Association, the 1992 Amendment did not substantially impair a contractual relationship in violation of the Contract Clause.

CONCLUSION

Based upon the foregoing and upon all files, records and proceedings herein, the Court holds that the 1992 Amendment to the Minnesota Life and Health Insurance Guaranty Act, Minn. Stat. § 61B.03, subd. 5(c), is constitutional and enforceable. Under the Act, the Association is obligated to guaranty ELIC's obligations to the individual participants in defined contribution pension plans who were residents of Minnesota at the time of ELIC's impairment, December 6, 1991.

Accordingly, IT IS ORDERED THAT Minnesota Life and Health Insurance Guaranty Association's motion for summary judgment (Doc. No. 61) is GRANTED; Honeywell's motion for summary judgment (Doc. No. 68) is DENIED; and its complaint DISMISSED WITH PREJUDICE.

The Association additionally has a subrogation claim pending against Honeywell's fiduciaries, which was stayed by stipulation of the parties pending resolution of this motion. The Court's order granting summary judgment to the Association on the constitutional claims, therefore, does not dispose of all claims in this action. Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the Court expressly determines that there is no just reason for delay and expressly directs the Clerk of Court to enter judgment in accordance with the foregoing Memorandum Opinion.

Dated: February 27, 1995.

/s/ Richard H. Kyle
RICHARD H. KYLE, Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case No. 3-93-260

HONEYWELL INC., AND THE HONEYWELL PENSION & RETIREMENT COMM., INVESTMENT PLUS PLAN OF HONEYWELL AND THE HONEYWELL RETIREMENT SAVINGS PLAN AND FIRST TRUST NATIONAL ASSOC.

v.

MINNESOTA LIFE AND HEALTH INS GUARANTY ASSOC.

JUDGMENT IN A CIVIL CASE

( ) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Minnesota Life and Health Insurance Guaranty Assoc's motion for summary judgment is GRANTED; Honeywell's motion for summary judgment is DENIED; and its complaint Dismissed with prejudice. The Court's order granting summary judgment to the Association on the constitutional claims, therefore, does not dispose of all claims in this action.

DATED: February 27, 1995

FRANCIS E. DOSAL
Clerk

By /s/ Patricia Kegley
PATRICIA KEGLEY
Deputy Clerk

APPENDIX E

SUPREME COURT OF MINNESOTA

No. C1-93-2470

HONEYWELL, INC., *et al.*,
Plaintiffs,

v.

MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION,
Defendant.

June 30, 1994

OPINION

TOMLJANOVICH, Justice.

The United States District Court, District of Minnesota, Third Division has certified to this court, pursuant to Minn.Stat. § 480.061 (1992), two questions of law pertaining to the effect of a 1992 amendment to the Minnesota Life and Health Insurance Guarantee Association Act, Minn. Stat. §§ 61B.01-.16 (1992). We answer the first certified question by holding that the 1992 amendment to the Act's definition of "contractual obligation" effects a substantive change in those obligations, and answer the second certified question by holding that the right to payment created in favor of annuity contract owners in Minn. Stat. § 61B.06, subd. 2 is a purely statutory right under state law.

The federal district court based the questions certified upon the entire record in this matter and upon the following statement of facts:

> The plaintiffs in this action are Honeywell Inc. and the Honeywell Pension & Retirement Committee, on their own behalf and on behalf of the Honeywell Retirement Investment Plan, Investment Plus Plan of Honeywell Inc. and the Honeywell Retirement Savings Plan, and First Trust National Association (collectively "Honeywell"). The defendant is the Minnesota Life and Health Insurance Guaranty Association ("the Association"); the Association was created pursuant to the Minnesota Life and Health Insurance Guaranty Association Act (the "Act"), Minn.Stat. § 61B.01-.16 (1992), and is comprised of entities authorized to transact insurance in Minnesota or any other kind of business to which the Act applies.[1] The Association is controlled by a nine-member Board of Directors selected by Association members and approved by the Commissioner of Commerce of the State of Minnesota.[2] *Id.* §§ 61B.03, subd. 14 & 61B.04-.05, subd. 1.
>
> *The Act and the 1992 Amendment*
>
> Under the Act, where a foreign insurer is placed under an order of liquidation, rehabilitation, or conservation, the Association
>
> > shall, subject to any conditions imposed by the association and approved by the commissioner, guarantee, assume or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of *residents*, and shall make or cause

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[1] Insurers are required to join the Association as a condition of receiving authority to transact insurance in Minnesota. Minn.Stat. § 61B.04 (1992).

[2] The Commissioner has general supervisory authority over the Association.

> to be made prompt payments of the impaired insurer's contractual obligations which are due and owing to *residents*.

Minn.Stat. § 61B.06, subd. 2 (emphasis added). The term "resident" is defined as "any *person* who resides in this state at the time the impairment is determined and to whom contractual obligations are owed." *Id.* § 61B.03, subd. 13 (emphasis added). The term "person" means "any individual, corporation, partnership, association or voluntary organization." *Id.* § 61B.03, subd. 12. Finally, prior to 1992, the term "contractual obligation," was defined as "any obligation owed under covered policies." *Id* § 61B.03, subd. 5. Under the Act, then, all residents are persons, but not all persons are residents; a person to whom an insurer does not owe a contractual obligation is not a resident for purposes of the Association's guarantee and payment obligations.

The dispute in this action arises out of a 1992 amendment to the definition of "contractual obligation";[3] the Amendment was one of a number of amendments to the Act which were enacted in 1992.[4] *See* 1992 Minn.Laws, ch. 540. As amended, "contractual obligation" means, in pertinent part:

> (a) "contractual obligation" means any obligation under covered policies, except as provided

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[3] Hereafter, the amendment to the definition of "contractual obligation" will be referred to as "the Amendment."

[4] The Act was originally enacted in 1977. 1977 Minn.Laws, ch. 273, and was amended several times during the years 1980 to 1992.

In 1993, the Minnesota Legislature reworked the Act, repealing Minn.Stat. §§ 61B.01-.16 and replacing them with Minn.Stat. §§ 61B.18-.32. 1993 Minn.Laws, ch. 319. The legislature provided that the 1993 amendments would apply prospectively; it further provided that the Association's obligations, as they relate to the Executive Life Insurance Corporation ("ELIC") rehabilitation, are governed by Minn.Stat. §§ 61B.01-.16. *Id.* § 19.

in subparagraph (c) and (d) of this subdivision.

(b) For purposes of this chapter, contractual obligation includes an unallocated annuity contract which funds a qualified defined contribution pension plan pursuant to Internal Revenue Code of 1986, sections 401(k), 403(b), and 457.

(c) Notwithstanding the definition of contractual obligation contained in paragraphs (a) and (b), contractual obligation does not include any obligation to non-resident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the date of impairment.

Id. The legislature specifically provided that the Amendment was to apply retrospectively. 1992 Minn.Laws ch. 540 § 23. The 1992 amendments to the Act were presented to the Governor on April 17, 1992 and signed into law on April 27, 1992.

The Dispute Between Honeywell and the Association

In early 1988, Honeywell, on behalf of one of its pension plan funds, the Fixed Income Fund, invested in guaranteed investment contracts [5] ("GICs") issued

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[5] Typically, GIC's are issued for a term of four to five years and bear a fixed rate of interest. GIC's are, theoretically, risk-free investments, as the issuer guarantees the safety of the principal and provides a predictable return on the amount invested.

GIC's are a variety of "unallocated annuity contracts." *Minnesota Life & Health Ins. Guar. Ass'n v. Department of Commerce*, 400 N.W.2d 769, 770, 774 (Minn.App.1987). As a result, section 61B.03, subd. 5(b) specifically provides that "contractual obligation" includes GIC's which fund pension plans such as the Plans.

by Executive Life Insurance Corporation ("ELIC"), a California insurer. As is generally required by ERISA, the assets of the Plans are owned by a trustee. 29 U.S.C. § 1103(a). At all times relevant to this action, IDS Bank and Trust Company ("IDS") was the trustee.[6] Under ERISA then, all ELIC GIC's purchased by Honeywell were owned by IDS as trustee for the Plans.

On April 11, 1991, the California Insurance Commissioner placed ELIC into conservatorship. As a result of the conservatorship, the portion of the Fixed Income Fund assets invested in ELIC GIC's has been "isolated," that is, segregated from the other assets of the Fixed Income Fund; those monies are not available, for any purpose, to participants in the Fixed Income Fund. The conservatorship proceedings have impacted participants because they cannot transfer the amount of their contributions in ELIC to other, more secure, investments. Currently, ELIC is undergoing a "rehabilitation" process, under which the affected participants may eventually recoup all or a portion of the assets currently isolated.

By letter dated January 10, 1992, Honeywell's Pension and Retirement Committee claimed coverage under the Act for the ELIC GIC's.[7] The Association neither denied nor granted this claim; however, following the enactment of the Amendment, the Association has taken the position that it is only required to guarantee and pay the losses incurred by individual plan participants who resided in Minnesota when ELIC was determined to be impaired; thus, the passage of the Amendment impacted, negatively, Honeywell's pending claim for coverage.

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[6] On February 8, 1993 First Trust Company, of St. Paul, Minnesota, was appointed successor trustee to IDS.

[7] Because ELIC is a "foreign" insurer for purposes of the Act, the Association's coverage obligations, if any, are governed by Minn.Stat. § 61B.06, subd. 2.

> Honeywell commenced this action on March 11, 1993; it claims that because IDS is a Minnesota "resident" under the Act, the version of the Act in existence prior to the Amendment unambiguously required the Association to guarantee and make good any obligations ELIC owed to IDS, the legal owner of the GIC's. Honeywell contends that because the Association wished to avoid Honeywell's claim, it caused the Minnesota Legislature [to] pass the Amendment. Honeywell further contends that the legislature's retrospective application of the Amendment to defeat its claim violates both the federal and state constitutions.
>
> In its Complaint, Honeywell raises seven claims: Count I—violation of the Act; Count II—breach of contract; Count III—violation of the Contracts Clause of Article I, section 10 [of] the United States Constitution; Count IV—violation of the Contracts Clause of * * * Article 1, section 11 of the Minnesota Constitution; Count V—violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; Count VI—violation of the Due Process Clause of article 1, section 7 of the Minnesota Constitution; and Count VII—violation of fiduciary duty.

(Order of Certification, Kyle, J., Civil No. 3-93-260, dated Dec. 6, 1993).

The district court certified to this court the following two questions of law:

> 1. Did the 1992 amendment to the Act's definition of "contractual obligation," to wit:
>
> > (c) Notwithstanding the definition of contractual obligation contained in paragraphs (a) and (b), contractual obligation does not include any obligation to non-resident participants of a covered plan or to the plan sponsor, employer,

> trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the date of impairment * * *

1992 Minn.Laws, ch. 540 § 5(c), *codified at* Minn. Stat. § 61B.03, subd. 5(c) (1992), clarify the Association's coverage obligations under the Act or effect a substantive change in those obligations?

2. Is the right to payment created in favor of annuity contract owners in Minn. Stat. § 61B.06, subd. 2 a purely "statutory" right or a right that is "contractual" in nature?

Id. These questions were certified for review by this court on December 10, 1993.

I

We consider first whether the 1992 amendment ("the Amendment") to the Act's definition of "contractual obligation" clarifies pre-existing law or substantively changes it. Under the Amendment, the Association must provide coverage to resident employees who are the beneficiaries of defined-contribution pension plans funded by unallocated annuity contracts; the Association has no obligation to provide coverage to non-resident employees and has no obligation to provide coverage to plan trustees or plan sponsors. Honeywell claims that the Amendment substantively changed the Association's coverage obligations. We agree.

The version of the Act prior to the Amendment provides that where a foreign insurer is placed under an order of liquidation, the Association

> shall, subject to any conditions imposed by the association and approved by the commissioner, guarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured, the covered policies of *resi-*

> *dents*, and shall make or cause to be made prompt payments of the impaired insurer's contractual obligations which are due and owing to residents.

Minn.Stat. § 61B.06, subd. 2 (1990) (emphasis added). The term "resident" is defined as "any *person* who resides in this state at the time the impairment is determined and to whom contractual obligations are owed". Minn. Stat. § 61B.03, subd. 13 (emphasis added). The term "person" is defined as "any individual, corporation, partnership, association or voluntary organization." Minn. Stat. § 61B.03, subd. 12. The term "contractual obligation" is defined as "any obligation under *covered policies*." Minn. Stat. § 61B.03, subd. 5 (emphasis added). The term "covered policy" is defined as "any policy or contract *owned* by a Minnesota resident to which sections 61B.01 to 61B.16 apply, as provided in section 61B.02." Minn.Stat. § 61B.03, subd. 6 (emphasis added). The term "owner" is not defined.

Unallocated annuity contracts, including Guaranteed Investment Contracts ("GIC's"), are ordinarily understood not to be owned by individual employees who are participants in pension plans which invest in these contracts. Rather, these contracts are deemed to be owned by either a plan trustee or a plan sponsor who is the contract holder. *See, e.g.*, Model Life and Health Guaranty Association Act § 5(n) (Nat'l Ass'n of Insurance Comm'rs 1985) (defining unallocated annuity contracts as "any annuity contract or group annuity certificate which is not issued to or owned by an individual"); *Minnesota Life & Health Ins. Guar. Ass'n v. Department of Commerce*, 400 N.W.2d 769, 770 (Minn.App.1987) (defining unallocated annuity contracts as contracts "not issued to or owned by a named individual").[8] The Employee Retirement Income Security Act (ERISA) generally requires

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[8] The court of appeals, in *Minnesota Life* held that unallocated annuities are covered generally under the Act and therefore should be included in the Association's assessment base.

that the assets of unallocated annuity contracts be held by a plan trustee. ERISA provides that the trustee and not plan participants have the sole responsibility to manage and control plan assets. *See* 29 U.S.C. § 1103(a).

The GIC's which Honeywell contends the Association must guarantee (those issued by ELIC to IDS on behalf of Honeywell) expressly provide that IDS, the plan trustee, is the contract owner. Plan participants are defined as "individual[s] on whose behalf the *Owner* will purchase or provide retirement benefits" (emphasis added). These GIC's further provide that "the owner may exercise every contract right and enjoy every contract privilege without the consent of any participant."

We agree with Honeywell that resident trustees who own unallocated annuity contracts are unambiguously entitled to coverage under the terms of the Act prior to the Amendment.[9] Unallocated annuity contracts are "covered policies" under the Act. *Minnesota Life*, 400 N.W.2d 769. The Association is obligated to guarantee the covered policies of residents. A "resident" is a person residing in Minnesota "to whom contractual obligations are owed." A "person" may be a corporation. In the absence of statutory language to the contrary, there can be no doubt that at plan trustee who owns an unallocated annuity contract is a person to whom contractual obligations are owed.

The Association argues that our interpretation of the pre-Amendment Act results in an unintended windfall for non-resident employees who are participants in pension

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[9] The parties debate whether under state trust law pension plan participants might be construed as having an equitable ownership interest in unallocated group annuity contracts. We need not determine here the precise nature of a beneficiary's interest in trust property generally. We simply observe that in the context of an unallocated annuity contract, it is ordinarily understood that the "owner" is the contract holder, not the individual plan participants who are the ultimate beneficiaries of the contract.

plans with a Minnesota trustee. Given that unallocated annuity contracts were not prevalent at the time of the statute's enactment in 1977, the legislature likely did not contemplate how the Act specifically applied to these contracts. We believe the Association's argument that the legislature did not intend to provide coverage to resident plan trustees is misplaced, however, where resident contract owners are plainly entitled to coverage under the Act. *See* Minn.Stat. § 645.16 (1992) ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit").

Nothing in the Act prior to its Amendment limits the Association's coverage obligations to natural persons. To the contrary, the term "person" is defined broadly to include corporations, partnerships, associations and voluntary organizations. Moreover, nothing in the Act prior to its Amendment limits an Association's obligation to nonresident beneficiaries of a covered plan.

Providing coverage to resident owners of unallocated annuity contracts is consistent with the Act's stated purpose which is:

> to protect policyowners, death benefit certificate holders, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts, subject to certain limitations against failure in the performance of contractual obligations due to the impairments of the insurer issuing the policies or contracts.

Minn.Stat. § 61B.02, subd. 2. Providing coverage to resident owners of an unallocated annuity contract is also the approach followed by the 1985 National Association of Insurance Commissioners' Model Act and at least 14 states have adopted this version of the Act.[10]

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[10] Alaska Stat. § 21.79.020(a)(2) (1993); Ark. Code Ann. § 23-96-107(a)(2) (Michie 1992); Del.Code Ann. tit. 18, § 4403 (1992);

We also find it significant that the Association prior to 1992 assessed insurers issuing unallocated annuity contracts based upon the amount of premiums received from resident contract owners, not based upon amounts attributable to individual resident beneficiaries.[11] One expects the Association would not have assessed members based upon the amount of premiums received from resident contract owners if it understood coverage obligations to be owed solely to resident plan participants.

We conclude that the 1992 Amendment to the Act's definition of "contractual obligation" substantively changed the Association's coverage obligations. Prior to the Amendment the Association was obligated to provide coverage to resident plan trustees who owned unallocated annuity contracts on behalf of defined contribution pension plans. Following the Amendment's enactment, the Association became obligated to provide coverage solely to resident plan participants who are the beneficiaries of unallocated annuity contracts.

Upon adopting the 1992 Amendment, the legislature specified that it "intended to clarify existing law" and that the Amendment applied retroactively. The Association suggests that we are obligated to defer to the legislature's characterization of the Amendment as a "clarification." We are not. In determining whether an amendment sub-

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Ga.Code Ann. § 33-38-2 (Michie 1990); Ill.Ann.Stat. ch. 215, para. 5/531.03(1)(b) (Smith-Hurd 1994); Iowa Code Ann. § 508C.3 (1994); Mich.Comp. Laws Ann. § 500.7704(1)(b)(2) (West 1993); Miss.Code Ann. § 83-23-205(1)(b) (1991), N.J.Stat.Ann. § 17B.32A-3(a)(2) (West 1994); N.C.Gen.Stat. § 58-62-21(a)(2) (1993); N.D.Cent.Code § 26.1-38.1-01(b) (1993); Ohio Rev.Code Ann. § 3956.04(A)(2) (Anderson 1993); Utah Code Ann. § 31A-28-103(1)(b) (1993); Wash.Rev.Code Ann. § 48.32A.020 (West 1994).

[11] Under Minn.Stat. § 61B.07, member insurers are supposed to be assessed based on a pro rata share of premiums received on "policies covered" relative to total premiums received on business in the state by all assessed member insurers.

stantively modifies prior law, we are not bound by a "clarifying" label, but analyze the intent and purpose of the original statute. *Rural American Bank of Greenwald v. Herickhoff*, 485 N.W.2d 702, 709 (Minn.1992) (Special Concurrence of Justice Simonett).[12] The 1992 legislature is not the interpreter of laws enacted by the 1977 legislature. *See Anderson v. Firle*, 174 Minn. 333, 219 N.W. 284, 285 (1928). If we were always to accept a legislature's characterization of an amendment as a "clarification," we would effectively be abandoning our power to interpret the law.

The Association additionally points to a letter sent on January 21, 1992 from Department of Commerce Assistant Commissioner Rochelle Bergin to the Association which expresses the position that the pre-Amendment Act provides coverage to resident plan participants but not to non-residents. The Association argues that we should defer to the Department of Commerce's interpretation of the statute as expressed in this letter.[13] We are not inclined to give it much weight where the meaning of the statute is unambiguous.

Finally, the Association argues that its position is supported by Minn.Stat. § 61B.06, subd. 8. This section limits the Association's liability to $100,000 in cash values

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[12] Where we have addressed legislative "clarifications," we ordinarily have been concerned with whether an amendment that seeks to "clarify" existing law should be given retroactive effect. *See Rural American Bank of Greenwald v. Herickhoff*, 485 N.W.2d 702, 706-707 (Minn. 1992), *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 475 N.W.2d 73, 76-77 (Minn.1991) and *Nardini v. Nardini*, 414 N.W.2d 184, 196 (Minn. 1987). Here, the legislature has specifically provided that the "clarifying" amendment should be given retroactive effect. Therefore, we are concerned solely with whether the Amendment is in fact a clarification or whether it is really a substantive modification of prior law.

[13] The Department of Commerce is the administrative agency charged with supervising the Association. *See* Minn.Stat. § 61B.04, subd. 2.

or $300,000 in benefits with "respect to any one life." The Association argues that if a plan trustee is covered under the Act, then the trustee must be the "life" to which the limitation applies. We believe that the per-life limit is plainly inapplicable to a trustee or other non-natural person.

II

The second certified question asks us to consider whether the right to payment in favor of annuity contract owners in Minn.Stat. § 61B.06, subd. 2 is a purely statutory right or a right that is contractual in nature. We hold that the right to payment is a purely statutory right under state law.

Honeywell argues that because the Act requires the Association to "guarantee" or "assume" contractual obligations, the Act creates contractual rights. We disagree. To the extent an annuity contract owner enjoys any rights against the Association, it is because they are set forth in a statute.[14] The Association's statutory obligations are not coextensive with the contractual obligations of a failed insurer. Under Minn.Stat. § 61B.06, subd. 2, the Association's obligations are "subject to any conditions imposed by the association and approved by the commissioner." Under Minn.Stat. § 61B.06, subd. 8, the aggregate liability of the Association is limited. The Commissioner may reduce the Association's obligations under Minn.Stat. § 61B.06, subd. 3.

There exists no contractual relationship between the Association and annuity contract owners. Honeywell argues that it is the third-party beneficiary of a contractual relationship among Association members. No such con-

[14] An annuity contract holder has contractual rights which may be asserted against the insurer, but these contractual rights are unaffected by the Act. Honeywell does not claim that the terms of the Act are an implied term in annuity contracts entered into between the insurer and the contract holder.

tractual relationship exists. Each member insurer is *required* by statute to participate in the Association as a condition of doing business in the state.[15]

Other state courts which have interpreted insurance guaranty association statutes have suggested that rights against guaranty associations are statutory in nature. *See Virginia Property and Casualty Ins. Guar. Ass'n v. International Ins. Co.*, 238 Va. 702, 385 S.E.2d 614 (1989); *Isaacson v. California Ins. Guar. Ass'n*, 44 Cal.3d 775, 244 Cal. Rptr. 655, 750 P.2d 297 (1988); *City of Greensboro v. Reserve Ins. Co.*, 70 N.C.App. 651, 321 S.E.2d 232 (1984). In *City of Greensboro*, for example, the North Carolina Court of Appeals held that prejudgment interest could not be assessed against an insurance guaranty association even though an insolvent insurer might have been liable for it in a breach of contract action. The court held that "the identity of the Association as a statutory creation * * * relieves it from liability for prejudgment interest." 321 S.E.2d at 240.

We answer the first certified question by holding that the 1992 amendment to the Act's definition of "contractual obligation" effects a substantive change in those obligations. We answer the second certified question by holding that the right to payment created in favor of annuity contract owners in Minn.Stat. § 61B.06, subd. 2 is a purely statutory right under state law.

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[15] Honeywell cites *Scobee Combs Funeral Home v. E.F. Hutton & Co.*, 711 F.Supp. 605, 608 (S.D.Fla.1989), which held that a customer was a third-party beneficiary of a National Association of Securities Dealers (NASD) Manual requiring members to arbitrate on demand. *Scobee* is clearly distinguishable from this case, however, because unlike the NASD, the Association is an entity created by statute.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-93-260

HONEYWELL INC. and the HONEYWELL PENSION & RETIREMENT COMMITTEE on their own behalf and on behalf of the HONEYWELL RETIREMENT INVESTMENT PLAN, INVESTMENT PLUS PLAN of HONEYWELL INC. and the HONEYWELL RETIREMENT SAVINGS PLAN, and FIRST TRUST NATIONAL ASSOCIATION,

Plaintiffs,

vs.

MINNESOTA LIFE and HEALTH INSURANCE GUARANTEE ASSOCIATION,

Defendant.

MEMORANDUM OPINION AND ORDER

Introduction

Plaintiffs Honeywell Inc. and the Honeywell Pension & Retirement Committee, on their own behalf and on behalf of the Honeywell Retirement Investment Plan, Investment Plus Plan of Honeywell Inc. and the Honeywell Retirement Savings Plan, and First Trust National Association (collectively "Honeywell") commenced this action against the defendant Minnesota Life and Health Insurance Guarantee Association (the "Association"); Honeywell seeks declaratory and injunctive relief in connection with a claim it filed with the Association for payment of obliga-

tions owed by Executive Life Insurance Corporation ("ELIC") under Guaranteed Investment Contracts ("GIC's") purchased to fund certain of Honeywell's employee retirement and pension plans (the "Plans"). Before the Court are the parties' cross-Motions for Summary Judgment.

Background

The Act and the 1992 Amendment

The dispute in this action concerns the effect of recent amendments to the Minnesota Life and Health Insurance Guarantee Association Act (the "Act").[1] Minn. Stat. § 61B.01-.16 (1992). The Act created the Association, which is comprised of entities authorized to transact insurance in Minnesota or any other kind of business to which the Act applies.[2] The Association is controlled by a nine-member Board of Directors ("Board"), selected by Association members and approved by the Commissioner of Commerce of the State of Minnesota ("Commissioner").[3] *Id.* §§ 61B.03, subd. 14 & 61B.04-.05, subd. 1.

Under the Act, where a foreign insurer—ELIC is such an insurer—is placed under an order of liquidation, rehabilitation, or conservation, the Association

> shall, subject to any conditions imposed by the association and approved by the commissioner, guaran-

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[1] The Act was originally enacted in 1977. 1977 Minn. Laws, ch. 273, and was amended several times during the years 1980 to 1992. In 1993, the Minnesota Legislature reworked the Act, repealing Minn. Stat. §§ 61B.01-.16 and replacing them with Minn. Stat. §§ 61B.18-.32. 1993 Minn. Laws ch. 319. The amendment specifically provides that it is prospective in application; it further provides that the Association's obligations in the case of ELIC are governed by Minn. Stat. §§ 61B.01-.16. *Id.* § 19.

[2] Insurers are required to join the Association as a condition of receiving authority to transact insurance in Minnesota. Minn. Stat. § 61B.04.

[3] The Commissioner has general supervisory authority over the Association.

> tee, assume or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of *residents*, and shall make or cause to be made prompt payments of the impaired insurer's contractual obligations which are due and owing to *residents*.

Minn. Stat. § 61B.06, subd. 2 (emphasis added). The term "resident" is defined as "any *person* who resides in this state at the time the impairment is determined and to whom contractual obligations are owed." *Id.* § 61B.03, subd. 13 (emphasis added). The term "person" means "any individual, corporation, partnership, association or voluntary organization." *Id.* § 61B.03, subd. 12. Finally, prior to 1992, the term "contractual obligation" was defined as "any obligation owed under covered policies." *Id.* § 61B.03, subd. 5. Under the Act, then, all residents are persons, but not all persons are residents; a person to whom an insurer does not owe a contractual obligation is not a resident for purposes of the Association's guarantee and payment obligations.

In 1992, the Minnesota Legislature amended various provisions of the Act. Laws 1992, ch. 540. Two provisions of those amendments are at issue in this litigation. First, the legislature amended the definition of "contractual obligation."[4] As amended, "contractual obligation" means, in part:

> (a) "contractual obligation" means any obligation under covered policies, except as provided in subparagraphs (c) and (d) of this subdivision.
>
> (b) For purposes of this chapter, contractual obligation includes an unallocated annuity contract which funds a qualified defined contribution pension plan pursuant to Internal Revenue Code of 1986, sections 401(k), 403(b), and 457.[5]

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[4] Hereafter, the amendment to the definition of "contractual obligation" will be referred to as "the Amendment."

[5] GIC's are a variety of "unallocated annuity contracts." *Minnesota Life & Health Ins. Guar. Ass'n v. Department of Commerce,*

> (c) Notwithstanding the definition of contractual obligation contained in paragraphs (a) and (b), contractual obligation does not include any obligation to nonresident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the dated of impairment.

Id. The legislature specifically provided that the Amendment was to apply retrospectively. 1993 Minn. Laws, ch. 540, § 23.

Under the amended definition of "contractual obligation," the Act, Minn. Stat. § 61B.06, subd. 2, requires the Association to guarantee and make "prompt payment" of an insurer's contractual obligations under an unallocated annuity contract—for example, a GIC—which funds a qualified pension plan. However, as to such contracts, the Association is obligated to make prompt payment and guarantee an impaired insurer's contractual obligations *only* to persons who are *both* (1) plan *participants* and (2) Minnesota residents on the date of impairment. The Association does not owe any obligations to either nonresident participants or entities that actually own the GIC which funds a plan.[6] The Amendment, then, both broadened and narrowed the definition of "contractual obligations."[7]

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400 N.W.2d 769, 770, 774 (Minn. Ct. App. 1987). Thus, section 61B.03, subd. 5(b) specifically provides that "contractual obligation" includes GIC's which fund pension plans such as the Plans.

[6] Although the Amendment does not define the term "covered plan," the only reasonable conclusion is that the term refers to a "qualified defined contribution pension plan pursuant to Internal Revenue Code of 1986, sections 401(k), 403(b), and 457," which appears in section 61B.03, subd. 5(b).

[7] Because the term "contractual obligation" specifically excludes obligations owed to either non-resident participants or non-participant owners of contracts funding pension plans, those categories of "persons" are not "residents" under Minn. Stat. § 61B.03,

The legislature also amended section 61B.06, subdivision 7,[8] which provides the Association with certain subrogation rights, including the right to require that a person receiving benefits under the Act assign certain rights and causes of action to the Association.[9] Section 61B.06, subdivision 7 now provides:

> (a) A person receiving benefits under sections 61B.01 to 61B.16 shall be considered to have assigned rights under, and any causes of action relating to, the covered policy or contract to the association to the extent of the benefits received because of sections 61B.01 to 61B.16,, whether the benefits are payments of or on account of contractual obligations or continuation of coverage, or provision of substitute or alternative coverages. The association may require

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subd. 13; they are not persons "to whom contractual obligations are owed under covered policies." Accordingly, the policies or contracts owned by such persons are not "covered policies" for purposes of the Association's obligations under § 61B.06, subd. 2. *See* Minn. Stat. § 61B.03, subd. 6 ("covered policy" means "any policy or contract owned by a Minnesota *resident*"). The Amendment, therefore, had the curious, and likely unintended, effect of removing such contracts from the Act's protection.

[8] Hereafter, the amendment to § 61B.06, subd. 7 will be referred to as "the Subrogation Amendment."

[9] Prior to the Amendment, § 61B.06, subd. 7 provided:

> Assignment, subrogation. (a) Any person receiving benefits under sections 61B.01 to 61B.16 shall be deemed to have assigned rights under the covered policy to the association to the extent of the benefits received, whether the benefits are payments of contractual obligations or continuation of coverage. The association may require an assignment to it of the rights by any payee, policy or contract owner, beneficiary, insured or annuitant as a condition precedent to the receipt of any rights or benefits conferred by sections 61B.01 to 61B.16 upon the person. The association shall be subrogated to these rights against the assets of any impaired insurer.
>
> (b) the subrogation rights of the association under this subdivision shall have the same priority against the assets of the impaired insurer as that of the person entitled to receive benefits.

> an assignment to it of those rights and causes of action by a payee, policy or contract owner, beneficiary, insured, or annuitant as a condition precedent to the receipt of any rights or benefits conferred by sections 61B.01 to 61B.16 upon that person. *The subrogation rights of the association include any rights that a person may have as a beneficiary of a plan covered under the Employee Retirement Income Security Act of 1974, United States Code, title 29, section 1003, as amended through December 31, 1991* [hereinafter "ERISA"].
>
> * * *
>
> (c) *In addition to paragraphs (a) . . . the association has all common law rights of subrogation and other equitable or legal remedies that would have been available to the impaired or insolvent insurer or holder of a policy or contract with respect to that policy or contract.*

Id. §§ 61B.06, subd. 7(a) & (c) (emphasis added). The Subrogation Amendment was also given a retrospective application. 1993 Minn. Laws, ch. 540, § 23.

For purposes of this action, the chief effects of the Subrogation Amendment were to (1) expressly provide that the Association was subrogated to a plan participant's rights under ERISA, (2) eliminate the provision that the Association was subrogated only to the rights or causes of action a plan participant had against the insurer, and (3) specifically provide, for the first time, that the Association had all of the rights to subrogation and other remedies available to a plan participant under common law.

The Dispute Between Honeywell and the Association

In early 1988, Honeywell, on behalf of the Plans' Fixed Income Plan, invested in GIC's issued by ELIC.[10] As is

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[10] GIC's typically are issued for a term of four to five years and bear a fixed rate of interest. GIC's are, theoretically, risk-free investments, as the issuer guarantees the safety of the principal and provides a predictable return on the amount invested.

generally required by ERISA, the assets of the Plans are owned by a trustee. 29 U.S.C. § 1103(a). At all times relevant to this action, IDS Bank and Trust Company ("IDS") was the trustee.[11] Under ERISA then, all ELIC GIC's purchased by Honeywell were owned by IDS as trustee for the Plans.

On April 11, 1991, the California Insurance Commissioner placed ELIC into conservatorship. As a result of the conservatorship, the portion of Fixed Income Fund assets invested in ELIC GIC's has been "isolated," that is, segregated from the other assets of the Fixed Income Fund, and is not available, for any purpose, to participants in the Plans. The conservatorship proceedings impacted participants because they cannot transfer the amount of their contributions in ELIC to other, more secure, investments. Currently, Executive Life is undergoing a "rehabilitation" process, under which plan participants may eventually recoup all or a portion of the assets currently isolated.

By letter dated January 10, 1992, Honeywell's Pension and Retirement Committee claimed coverage under the Act for the ELIC GIC's. The Association neither denied nor granted this claim. The 1992 amendments to the Act were presented to the Governor on April 17, 1992 and signed by the Governor on April 27, 1992; they impacted, negatively, Honeywell's pending claim before the Association. Honeywell commenced this action on March 11, 1993.

Honeywell claims that because IDS is a Minnesota "resident" under the Act, the version of the Act in existence prior to 1992 required the Association to guarantee and make good any obligations ELIC had to IDS, the legal owner of the GIC's. Honeywell contends that because the Association wished to avoid Honeywell's claim, it had the Minnesota Legislature pass the Amendment. Honey-

[11] On February 8, 1993 First Trust Company, of St. Paul, Minnesota, was appointed successor trustee to IDS.

well alleges that the Amendment is not objectionable in and of itself; however, the legislature's retrospective application of the Amendment to defeat its claim violates both the federal and state constitutions. Honeywell also claims that the Subrogation Amendment is preempted by ERISA.

In its Complaint, Honeywell raises seven claims: Count I—violation of the Act; Count II—breach of contract; Count III—violation of the Contracts Clause of Article 1, section 10 the United States Constitution; Count IV—violation of the Contracts Clause of the Article 1, section 11 of the Minnesota Constitution; Count V—violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution; Count VI—violation of the Due Process Clause of Article 1, section 7 of the Minnesota Constitution; and Count VII—violation of fiduciary duty.

Discussion

I. Standard of Decision

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. Under that Rule:

> [summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Ordinarily, the court's task on a motion for summary judgment is to determine whether the record, as identified by the parties, shows the existence of a real controversy

over a material issue, such that the controversy must be resolved by the finder of fact at trial. In this case, both parties have represented to the Court that the issues to be determined on the cross-motions are ready for decision and that they are questions of law. Accordingly, although a decision on the cross-motions will not finally dispose of the litigation, it will resolve the core dispute between the parties.

II. Motion for Summary Judgment on the Amendment

A. Did The Amendment Clarify or Change the Act?

Generally, the adoption of an amendment to a statute raises a presumption that the legislature intended to make some change in the existing law. *Brotherhood of Ry. Clerks v. State by Balfour*, 299 N.W.2d 3, 13 (1975). However, where an amendment is adopted to "clarify" rather than alter the statute, the presumption is rebutted. *State by Spannaus v. Coin Wholesalers, Inc.*, 250 N.W.2d 583, 588 (Minn. 1976). In other words, where an amendment rewords and clarifies the statute, that is, makes clear what the law already is and has been, the statute remains unchanged; thus, there is "really no question of retroactivity to be decided." *Gudvangen v. Austin Mut. Ins. Co.*, 284 N.W.2d 813, 817 (Minn. 1979), *app. dismissed*, 444 U.S. 1062, 100 S. Ct. 1002, 62 L.Ed.2d 745 (1980). Retrospective application of non-clarifying amendments is subject to limitations.[12]

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[12] The parties' citation to cases such as *Rural American Bank v. Herickhoff*, 485 N.W.2d 702 (Minn. 1992), *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987), and *Holman v. All Nation Ins. Co.*, 288 N.W.2d 244 (Minn. 1980) reflects that the parties may be confusing why the clarification question is important in this case. In cases like *Nardini* and *Herickhoff* the issue of clarification was important because ordinarily, a statute is not to be retrospectively applied unless it specifically so states, Minn. Stat. §§ 645.21, 645.31; however, a clarifying amendment is to be read into statutory law retrospectively. Both *Nardini* and *Herickhoff* involved statutes which were silent on retrospectivity. Here, the legislature spe-

Honeywell and the Association disagree as to whether the Amendment merely clarified the Act or whether it worked a substantive change in the Act. However, both parties agree that the relationship between the Act and the Amendment must be determined because if the Amendment merely clarified what the legislature had intended "contractual obligation" to mean from the Act's genesis in 1977, the legislature's retrospective application of the Amendment would pass constitutional muster.[13]

Initially, the Court disagrees with the Association's claim that "[*Rural American Bank v. Herickhoff*, 485 N.W.2d 702 (Minn. 1992)] and the long line of cases coming before it set forth a straight-forward bright-line rule: when a legislature expressly indicates its intent that an amendment to an existing statute is merely a clarification and does not change existing law, the clarification must be applied to cases arising on or before the clarification." [14] (Def's Mem. Supp. Summ. J., at 10.) The decisions of the Minnesota Supreme Court make it clear that this Court is not required to "accept" a later legislature's interpretation of what an earlier legislature intended. Whether an amendment was, in fact, a clarification must be decided by the court, even if the legislature specifically states that the amendment was a clarifying amendment.

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cifically provided for retrospective application. *See* 1993 Minn. Laws, ch. 540, § 23.

[13] The character of the Amendment would not affect the question whether ERISA preempts the Amendment. In fact, given a federal court's obligation to construe a statute so as to avoid a conflict with the federal constitution, the issue of ERISA preemption would precede any analysis of alleged constitutional infirmities.

[14] Apparently, the Association believes that this Court must accept the legislature's statement that the Amendment "clarifies existing law" and infer that the broad definition of "contractual obligation" in section 61B.03, subd. 5 was never intended to include obligations owed to nonresident participants and trustee owners under a GIC which funds a pension plan.

See e.g., Willmar v. Short-Elliott-Hendrickson, 475 N.W.2d 73, 76-77 (Minn. 1991).

Moreover, such a rule would violate the long-standing principle that the "opinion of a subsequent legislature upon the meaning of a statute is entitled to no more weight than that of the same [people] in private capacity," *Bingham v. Supervisors of Winona County*, 8 Minn. 390, 398 (1878), *quoted in Gudvangen*, 284 N.W.2d at 818-19 (Otis, J., dissenting). Finally, it is undisputed that the Association sought the Amendment only after Honeywell asserted its claim to coverage; given this history, deferring to this legislature's use of "clarifying" would be improper.[15] *See Rural American Bank*, at 709-10 (Simonett, J., concurring). Accordingly, standard principles of statutory construction will guide the Court's effort to discern whether the Amendment clarified the definition of "contractual obligation" or effected a substantive change thereof.

Minnesota has established certain directives which are to be used when reviewing statutes, the most basic of which points the court to the language of the statute: "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of a law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16. The intention of the legislature becomes relevant only if the words of a law are not "explicit." *Id.* Where legislative intent is used to determine a statute's meaning, section 645.16 sets forth certain factors to be considered. In addition, section 61B.02, subdivision 3 provides a specific directive for construing and interpreting the Act, should interpretation be necessary.

The Association contends that the "fundamental issue" before the Court is "in the context of a pension GIC,

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[15] Moreover, permitting legislative bodies to avoid constitutional review by including the word "clarify" in a statute would make a nullity of both due process and the Contracts Clause.

where a trustee holds the GIC strictly in a fiduciary capacity for the benefit of plan participants who invested their funds for the purchase of the GIC, to whom are contractual obligations 'owed' within the meaning of the [Act]?" (Def's Reply Mem. Supp. Summ. J., at 2.) The Association claims that this issue had not been *directly and explicitly* addressed in the Pre-Amendment Act; hence, the precise manner in which the Act addresses pension GIC's was unclear. Accordingly, the Association continues, the Amendment merely clarified an ambiguity which existed in the Act since its passage: that the Association was only obligated to cover the losses of individual plan participants who reside in Minnesota on the date impairment is determined. *See* Minn. Stat. § 61B.03, subd. 5(c). The Court disagrees.

A statute's clarity is not dependent upon the statute addressing every potential factual scenario which may arise under it. Instead, the question asked by Minn. Stat. § 625.16 is whether the statute becomes ambiguous in the context of a specific set of facts. *See Rural American Bank*, 485 N.W.2d at 709 (Simonett, J., concurring). If not, the statute's meaning is clear, even though it may not specifically address the factual context of a given dispute. Thus, the Association incorrectly asserts that the pre-Amendment Act is ambiguous because it did not address the person to whom "contractual obligations" are owed where GIC's are funded by individual pension plan participants.

Under applicable principles of statutory interpretation, the Court concludes that the Amendment effected a substantive change in the Act's definition of "contractual obligation." Under the Act as it existed prior to 1992, corporate trustees that owned unallocated annuity contracts were "residents" if they resided in Minnesota on the date impairment was determined and if contractual obligations were owed to them. Contractual obligations were any obligations owed under "covered policies." At the time Honeywell filed its claim, covered policies were

those policies or contracts owned by a Minnesota resident to which the Act applied. As *Minnesota Life* had determined that the Act applied to GIC's, the language of the Act clearly and unambiguously provided that IDS, as the "person" that owned the GIC's, could call upon the Association to guarantee and make payment of the obligations ELIC owed to IDS under the GIC's.[16] Accordingly, the presumption that the Amendment substantively changed the Act stands unrebutted.[17]

1. The Department of Commerce's "Interpretation"

Even if the Act was ambiguous, nothing offered by the Association demonstrates that earlier legislatures intended the Act to apply only to individual plan participants who reside in Minnesota. First, the Court rejects the Association's contention that it must afford deference and weight to what the Association contends is an interpretation of the Act by the Department of Commerce ("Department"). A January 22, 1992 letter from Assistant Commissioner Rochelle Bergin to Association President Robert J. Hasling, to the effect that the Association is only obligated to make payments to plan participants who are residents of Minnesota, is, the Association argues, a decision or "opinion" by the Department.[18]

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[16] The Court finds no merit in the Association's argument that the *Minnesota Life* court determined only that GIC's were covered under the Act for purposes of assessing member insurers, but not for purposes of determining the Association's coverage obligations. *Minnesota Life* affirmed the Commissioner of Commerce's decision that GIC's were covered under the Act as "annuity contracts." Minn. Stat. § 61B.02, subd. 2. Accordingly, GIC's are contracts to which the Act applies. That fact ends the inquiry.

[17] Once presented with the facts underlying the Honeywell claim, the legislature may have determined to change the Act. That it was entitled to do. However, as a *change* in the Act, the retrospective application of the Amendment is subject to certain limitations.

[18] Department Counsel, Richard S. Gomsrud, states in an affidavit that Honeywell, the Association, and other parties sought a "determination" as to whom coverage obligations were owed with respect

Under the Act, the "Commissioner" is defined as the "Commissioner of Commerce of the State of Minnesota and, in the Commissioner's *absence or disability, a* deputy of the Association, *id.* §61B.04, subd. 2, the Commissioner's place." Minn. Stat. § 61B.03, subd. 14 (emphasis added). In addition to being the immediate supervisor of the Association, *id.* § 61B.04, subd. 2, the Commissioner assumes several other roles in furtherance of its supervisory capacity.[19] The Commissioner also has certain powers and duties which are or may be exercised to effectuate the purposes of the Act.[20]

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to GIC's held by pension plans. Second Gomsrud Aff., ¶ 3. Gomsrud further states that after meeting with representatives of the parties and "carefully considering" their arguments, the Department issued its determination as to the Association's coverage obligations for GIC's. *Id.* ¶¶ 5, 7. In reaching the determination, the Department "gave the same considerations to the parties' positions and relied upon the Department's expertise and experience in interpreting the Act to the same extent it would have in a formal hearing" even though none of the parties had sought a hearing pursuant to the Act. *Id.* ¶ 7.

[19] The Commissioner (1) approves the members of the Association's Board of Directors, id. § 61B.05, subd. 1, 2; (2) approves conditions that the Association places on its guarantee obligations, *id.* § 61B.06, subd. 1, 2; (3) imposes (pursuant to the Association's request) liens, moratoriums, or other similar means to ensure performance of a failed insurer's contractual obligations, *id.* § 61B. 06, subd. 3; (4) requests assistance and advice from the Association, *id.* 61B.06, subd. 5; (5) announces and publishes any changes in the dollar amounts of the Association's aggregate liability, *id.* § 61B.06, subd. 8a; (6) permits the Association to exercise the powers of a domestic life or health insurer, *id.* § 61B.06, subd. 9(a)(7); and (7) approves the Association's plan of operation and promulgates rules and regulations where necessary to effectuate the purpose of the Act, *id.* § 61B.08, subd. 1.

[20] In particular, the Commissioner has the express duty to (1) notify the Board of any impairment; (2) provide the Association with a statement of premiums in the appropriate states for each member insurer; and (3) serve a demand upon an impaired insurer to make good an impairment. *Id.* § 61B.09, subd. 1. The Commissioner also has the power to (1) suspend or revoke the certificate

Upon a review of the Commissioner's powers, duties and obligations under the Act, the Court is unable to discern any provision in the Act which specifically provided the Commissioner with the authority to issue an opinion, decision, or order on the Association's coverage obligations in the absence of an appeal from an action of the Board. There is nothing in the record indicating that Honeywell had appealed from any action; Gomsrud's affidavit indicates that the parties were engaging only in informal discussions. The letter, therefore, was neither an "order" nor a "decision" under the APA.[21] *See* Minn. Stat. § 14.57-.62.

Finally, assuming, *arguendo*, that the Commissioner had the power to issue a binding interpretation of the Association's coverage obligations in situations such as the one at issue here, there has been no showing that *Assistant Commissioner* Bergin had the authority under section 61B.03, subd. 14 to issue that interpretation or opinion.

In summary, whatever the January 14, 1992 letter purports to be, it does not represent an official interpretation of the Act, whether by rule, order, or final action. There-

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of authority to transact insurance of any member insurer and levy forfeitures on any member insurer, *Id.* § 61B.09, subd. 2; (2) review any action of the Board upon appeal (the final action or order of the Commissioner is subject to judicial review under the provisions of Minnesota's Administrative Procedure Act ("APA"), Minn. Stat. § 14.01-.69; and (3) examine and regulate the Association. Minn. Stat. § 61B.13.

[21] Moreover, the January 22, 1992 letter was not a "rule" promulgated pursuant to section 61B.08, subd. 1. There has been no showing that a situation existed permitting the Commissioner to exercise his rulemaking authority under the Act. *See* Minn. Stat. § 61B.08, subd. 1. Further, if the Commissioner had intended that the letter be a "rule," under the APA's definition of that term, Minn. Stat. § 14.02, subd. 4, it was not issued in compliance with the APA's procedures for promulgating (1) rules adopted after a public hearing, *id.* §§ 14.131-.20; (2) rules adopted without public hearing, *id.* §§ 14.22-.29; or (3) emergency rules. *Id.* §§ 14.29-.36.

fore, even if legislative intent was a necessary inquiry in this case, that letter would not be relevant evidence of what the legislature intended.

2. The Role Ownership of the GIC's Plays in Determining Legislative Intent

In 1989, the legislature amended the definition of "covered policy" to mean "any policy or contract *owned by a Minnesota resident* to which sections 61B.01 to 61B.16 apply, as provided in section 61B.02." Minn. Stat. § 61B.03, subd. 6 (1990).[22] The Court also rejects the Association's claim that the 1989 amendment to the term "covered policy" supports its contention that the legislature always intended that the Act protect only individuals who reside in Minnesota (in the case of GIC's which fund pension plans, plan participants who live in Minnesota). (Def's Mem. Supp. Summ. J., at 13. (quoting Sen. Commerce Committee, May 15, 1989, statement of Sen. Luther; H.R. Ins. Committee, May 15, 1989, statement of Rep. Skoglund).

As noted *supra*, the Act defines "resident" as "a person who resides in this state at the time impairment is determined and to whom contractual obligations are owed." Minn. Stat. § 61B.03, subd. 13. IDS is a "person" under section 61B.03, subd. 12 of the Act. It is undisputed that IDS was residing in Minnesota at the time ELIC was determined impaired; hence, because "contractual obligations" meant any obligation owed under covered policies, *id.* § 61B.03, subd. 5, the Association was obligated to guarantee any contractual obligations owed IDS under the GIC's *if IDS "owned" the GIC's.*

That IDS owned the GIC's, albeit for the benefit of the plan participants, is established by *Minnesota Life* and the GIC's themselves. The GIC's identify IDS as "owner,"

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[22] As originally enacted, "covered policy" meant "any policy or contract to which sections 61B.01 to 61B.16 apply, as provided in section 61B.02." Minn. Stat. § 61B.03, subd. 6 (1988).

distinguishing it from "participants," who are the "individual[s] on whose behalf owner will purchase or provide retirement benefits." Ververken Aff., Exh. A, at 4.

Moreover, had the legislature intended to narrow the reach of the Act in the manner asserted by the Association, it could have amended the Act to specifically define "owned" in the context of unallocated annuity contracts generally, or specifically, GIC's which fund pension plans.[23] In the absence of such a definition, the 1989 amendment to "covered policy" had no affect on the Act's application to GIC's owned by a corporate trustee residing in Minnesota. Certainly, the 1989 amendment does not further the Association's argument that the Act originally was intended to apply only to *human beings*.[24]

Moreover, the legislature's use of "own" in the Amendment itself furthers the conclusion that ownership of a GIC lies with the person who has legal title to a policy or contract under the terms of the policy or contract. The Amendment provides that "contractual obligation" does not include "any obligation to the plan sponsor, employer, trustee, or *other party who owns*" an unallocated annuity contract which funds a pension plan. Minn. Stat. § 61B.03, subd. 5(c). If, as the Association argues,

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[23] The Act could have ben amended to define "owned as follows: " 'owned,' in the case of unallocated annuity contracts funding a pension plan, means the beneficial interest held by a plan participant pursuant to their contribution to the plan." Under this definition, a GIC would be a "covered policy" only to the extent of individual plan participants' interest therein. As a result, contractual obligations would be owed only to such persons.

[24] The Court notes that after the 1989 Amendment to the definition of "covered policies," GIC's owned by trustes or other entities that do not reside in Minnesota are not "covered policies" because they are not "owned by a Minnesota resident." *See* Minn. Stat. § 61B.03, subd. 6. The Association, therefore, had no obligation to Minnesota residents who were participants in pension plans funded by such GIC's. However, plan participants residing in Minnesota were covered if their GIC's were owned by entities residing in this state.

ownership lies with the individual participants who contribute funds to the plan, the legislature's use of "own" in the subdivision 5(c) would conflict with subsequent language (in that same subdivision) that the Association owes a contractual obligation to participants who reside in Minnesota. *Id.* In other words, if plan participants "own" GIC's through their beneficial interest in them, subdivision 5(c) would include plan participants in and then exclude them from the definition of contractual obligation. This is an absurd result.

3. Summary

The presumption that the Amendment substantively changed the Act stands unrebutted; thus, it must be applied prospectively in the absence of a statement providing for retrospective application. Minn. Stat. § 645.21. As noted *supra*, the legislature expressly stated that the Amendment was to be applied retroactively. The question thus becomes whether retrospective application of the Amendment is proper. Honeywell contends that (1) the Amendment is preempted by ERISA; and (2) if not preempted, the Amendment cannot be applied retrospectively because retrospective application would violate (a) the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the parallel provision in the Article 1, section 7 of the Minnesota Constitution, and (b) the Contracts Clause of the Article I, section 10 of the federal constitution and the parallel provision in Article 1, section 11 of the Minnesota Constitution. If the Amendment is preempted by ERISA, it is void and unenforceable; however, if the federal and state constitutions prohibit retrospective application, the Amendment could still be applied prospectively. Under either scenario, the Act would require the Association to honor Honeywell's claim.

B. ERISA Preemption and the Amendment

Section 514(a) of ERISA provides that the statute "shall supersede any and all State laws insofar as they

may now or hereafter relate to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a). Unless a law is exempted from the preemption provision, 29 U.S.C. § 1144(b)(2)(A), it will be preempted if it "relates to" an ERISA-covered plan.

Honeywell contends that the Amendment "relates to" an ERISA plan because § 61B.03, subd. 5(c) premises the Association's statutory obligations on the existence of a pension plan covered by ERISA. Honeywell further claims that the Amendment does not fall within the "insurance savings clause" set forth in 29 U.S.C. § 1144 (b)(a). The Association responds that the Amendment is not preempted because the Amendemnt is not "related to" an ERISA plan and in any event, it falls within the insurance savings clause.

1. The Amendment is "Related To" an ERISA Plan

The Supreme Court recently stated that a law "relates to" a covered employee benefit plan for purposes of ERISA preemption "if it has a connection with or reference to such a plan." *District of Columbia v. Greater Wash. Bd. of Trade*, 113 S. Ct. 580, 583, 121 L.Ed.2d 513 (1992) (citations omitted). This broad reading of "relates to" gives effect to the "deliberately expansive" language present in section 514(a). *Id.* (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S. Ct. 1549, 1552, 95 L.Ed.2d 39 (1987)). Laws relating to or connected with covered plans are preempted "even if the law is not specifically designed to affect such plans or the effect is only indirect," *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S. Ct. 478, 483, 112 L.Ed.2d 474 (1990), and even if the law is "consistent with ERISA's substantive requirements." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S. Ct. 2380, 2389, 85 L.Ed.2d 728 (1985). However, state laws which have only a "tenuous, remote, or peripheral" connection with an ERISA-covered plan are not

preempted. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21, 103 S. Ct. 2890, 2901 n.21, 77 L.Ed.2d 490 (1983). Similarly, the mere fact that a law might burden the administration of a plan does not, by itself, compel preemption. *Ingersoll-Rand*, 111 S. Ct. at 483 (citing *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 841, 108 S. Ct. 2182, 2191, 100 L.Ed.2d 836 (1988)).

Two recent decisions of the Supreme Court support a conclusion that the Amendment is related to a plan regulated by ERISA. In *Greater Wash. Bd. of Trade*, the Supreme Court held that the District of Columbia's Workers' Compensation Equity Amendment Act of 1990 ("Equity Act"), 37 D.C. Register 6890, "specifically refer[red]" to welfare benefit plans regulated by ERISA and "on that basis alone" was preempted by ERISA.[25] 113 S. Ct. at 583. The "welfare benefit plan" at issue therein was an employer-sponsored health benefit plan for employees. As such, it was subject to ERISA regulation. *Id.* at 584. The Supreme Court concluded that because the Equity Act imposed requirements by "reference to" such a covered plan, it had to yield to ERISA. *Id.*

In *Ingersoll-Rand*, the Supreme Court held that a state law cause of action was preempted by ERISA. In that case, the Supreme Court of the State of Texas had developed a common-law right of action for employees who were terminated by their employer out of a desire to avoid paying into an employee's pension fund. 111 S. Ct. at 481. In reversing the lower court's decision, the Supreme Court reasoned that the existence of pension plan was a "critical factor" in establishing liability under Texas'

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[25] The Equity Act provided:

> "Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter."

D.C. Code Ann. § 36-307(a-1) (Supp. 1992).

wrongful discharge law. *Id.* at 483. As a result, the Supreme Court concluded that the cause of action not only made explicit reference to, but indeed was "premised on the existence of a pension plan." *Id.* In other words, there "is no cause of action if there is *no* plan." *Id.* at 484 (emphasis supplied).

In this case, subdivision 5(c) of the Amendment excludes GIC owners and nonresident participants from the term "contractual obligation" *only when* "an unallocated annuity contract . . . funds a qualified defined contribution pension plan." Minn. Stat. § 61B.03, subd. 5(c). Under the Amendment then, the Association's obligations under the Act are determined by the *existence* (or non-existence) of a pension plan that is subject to regulation under ERISA. In other words, in the factual situation before the Court, the existence of an ERISA-governed pension plan is a "critical factor" in establishing the Association's obligations to act when an insurer is determined to be impaired.[26] Section 61B.03, subdivision 5(b), therefore, "relates to" an ERISA-covered plan within the meaning of section 514(a).

2. The "Insurance Savings Clause" Applies

"The sphere in which § 514(a) operates [is] explicitly limited by § 514(b)(2)." *Metropolitan Life Ins. Co.*, 471 U.S. at 739, 105 S. Ct. at 2389. Section 514(b)(2) of ERISA provides that "[with one exception not relevant here,] nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities." 29 U.S.C. § 1144(b)(2)(A). Because the Court has deter-

[26] In determining that the Amendment "relates to" an ERISA plan, this Court does not also conclude that *Greater Wash. Bd. of Trade* holds that a law is preempted merely because it makes reference to a plan regulated by ERISA or contains the phrase "ERISA." Rather, *Greater Wash. Bd. of Trade* makes clear that a state law "relates to" an ERISA-governed plan when it ties some requirement, obligation, duty, right, or privilege to that plan.

mined that subdivision 5(c) of the Amendment "relates to" a pension plan that falls within ERISA, subdivision 5(c) of the Amendment is preempted unless it falls within the insurance savings clause.

There are two tests to consider in determining whether a statute falls within ERISA's "law regulating insurance" savings clause—a "common sense" test and the three-part test applied under the McCarron-Ferguson Act to determine whether a particular practice falls within that statute's reference to the "business of insurance." *Pilot Life*, 481 U.S. at 48, 107 S. Ct. at 1553. The common sense test directs the court to look take a "common sense view" of the language of the savings clause itself and determine whether the law "regulates insurance" under a common sense view of that term.[27] *Metropolitan Life*, 471 U.S. at 740, 105 S. Ct. at 2389. To regulate insurance under a common sense view of the savings clause, a state law "must not just have an impact on the insurance industry, but must be specifically directed toward that industry. *Pilot Life*, 481 U.S. at 50; 107 S. Ct. at 1554. The McCarron-Ferguson test requires the court to consider three factors: (1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry. *Metropolitan Life*, at 743, 105 S. Ct. at 2391.

The Court concludes that both the common sense and *McCarron-Ferguson* "business of insurance" tests support a conclusion that the Amendment "regulates insurance." First, subdivision 5(c) of the Amendment is concerned with the *existence* of the Association's obligations to

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[27] The Court notes that despite counsels' statements to the contrary, the only connection the issues in this litigation have with "common sense" regards analyzing the applicability of the insurance savings clause.

policyholders—in the case of GIC's, contract owners. Second, the basic obligations set forth in subdivision 5(c) flow from the relationship between an insurance company and its policy holders and are no different than the failed insurer's own obligations; thus, the fundamental activity involved is insurance. Finally, subdivision 5(c), like the remainder of the Act, is concerned with the reliability of GIC contracts issued by insurers, which is at the "core of the 'business of insurance.'" *United States Treasury Dept. v. Fabe*, —— U.S. ——, 113 S. Ct. 2202, 2208, 124 L.Ed.2d 449 (1993).

In summary, although subdivision 5(c) of the Amendment is a law "related to" a pension plan governed by ERISA, it falls within the insurance savings clause set forth in ERISA section 514(b)(2)(A). 29 U.S.C. § 1144(b)(2)(A). Accordingly, the Amendment is not preempted by ERISA and the constitutional questions raised by its retrospective application must be examined.

C. Is Retrospective Application Constitutional?

Honeywell contends that retrospectively applying the Amendment violates its right to due process under the Fourteenth Amendment to the United States Constitution and Article 1, section 7 of the Minnesota Constitution [28] and unlawfully impairs its contract rights under Article I, section 10 of the federal constitution and Article 1, section 11 of the Minnesota constitution.[29] Although Honeywell raises several theories of constitutional law in support of its position, its contention that retrospective application would impermissibly deprive it of "vested rights" under the Act is dispositive.

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[28] Amendment XIV, § 1 of the federal constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." Minn. Const., art. 1, § 7, contains identical language.

[29] Article I, § 10 of the federal Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Minn. Const., art. 1, § 11 contains substantially similar language.

Acts of the legislature are presumed constitutional and the party seeking to invalidate an act as unconstitutional bears the burden to demonstrate that the act is unconstitutional. Honeywell contends that the Amendment is unconstitutional because under both the United States Constitution and the Minnesota Constitution, retroactive legislation may not divest private parties of "vested rights."[30] *Coombes v. Getz*, 285 U.S. 434, 442, 52 S. Ct. 435, 436, 76 L.Ed. 866 (1932); *Holen v. Minneapolis-St. Paul Met. Airports Comm'n*, 250 Minn. 130, 136, 84 N.W.2d 282, 287 (1957). Honeywell contends that under the pre-Amendment version of the Act, IDS, a Minnesota resident, owned the ELIC GIC's; thus, under section 61B.06, subdivision 7, IDS had a vested right to coverage under the Act if ELIC was determined to be impaired. The retrospective application of subdivision 5(c) of the Amendment, Honeywell continues, deprives IDS—and through it, Honeywell—of the Association's coverage obligations thereby unlawfully destroying the contract rights created by the Act.

Ordinarily, rights remain inchoate and do not vest in an existing law until a *final* judgment has been entered

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[30] Minnesota courts have repeatedly referred to a "vested" right as "something more than a mere expectancy, based upon anticipated continuance of present laws. It must be some right or interest in property that has become fixed or established and is not open to doubt or controversy." *See e.g., Olsen v. Special School Dist. No. 1*, 427 N.W.2d 707, 711 (Minn. Ct. App. 1988) (quoting *Schwartzkopf v. Sac County Bd. of Supervisors*, 341 N.W.2d 1, 8 (Iowa 1983) (citations omitted)); *see also Snortum v. Snortum*, 155 Minn. 230, 233, 193 N.W. 304, 306 (1923). This definition comports the view expressed by the Minnesota Supreme Court in *Peterson v. Minneapolis*, 285 Minn. 282, 288, 173 N.W.2d 353, 357 (1969): " 'vested interest' when used in the constitutional sense to describe the kind of interest that canot be impaired by subsequent legislation, reflects a determination that justice and equity require that the interest be preserved." Minnesota' construction of "vested right" mirrors the Supreme Court's definition of that term. *See Ettor v. Tacoma*, 228 U.S. 148, ——, 33 S. Ct. 428, 430 (1913).

therein.[31] *Holen*, 250 Minn. at 136, 84 N.W.2d at 287; *McClelland v. McClelland*, 393 N.W.2d 224, 227 (Minn. Ct. App. 1986). There are conditions, however, under which private rights may "vest" without regard to whether final judgment has been entered. "When a right has arisen upon a contract, or transaction in the nature of a contract, authorized by statute and liabilities under that right have been so far determined that nothing remains to be done by the party asserting it, it becomes vested and the [amendment] of the statute does not affect it or the action for its enforcement." *Yaeger v. Delano Granite Works*, 250 Minn. 303, ——, 84 N.W.2d 363, 366 (1957); *see Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450, 457-58 (1864). The same result is reached where a statute, although not authorizing a contract, creates contractual liability independent of, i.e., may be enforced without regard to, the statute itself. *Coombes*, 52 S. Ct. at 436. In either case, the vested nature of the right claimed precludes subsequent legislation from being retrospectively applied to destroy the ability to enforce the right.[32]

In *Coombes*, the California Constitution of 1879 provided that "the directors or trustees of a corporation and

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[31] The Association takes issue with Honeywell's reliance on several Minnesota decisions discussing whether retrospective legislation can affect vested rights in accordance with due process or the Contracts Clause. (Def's Mem. Opp'n Mot. Summ J., at 9-15.) That the facts underlying those decisions differ from the facts of the case at bar is immaterial; they are relevant because they establish that vested rights, however created, cannot, consistent with constitutional principles, be defeated by retrospective application of subsequent legislation.

[32] The Association contends that Contract Clause is inapplicable to Honeywell's rights against the Association because the rights, if any, arise under the statute, not from any "contract" with the Association. As is discussed *infra*, Honeywell's claims against the Association may actually be contractual in nature. Moreover, in *Coombes*, the Supreme Court relied on both the Contracts Clause and Due Process Clause to invalidate the state statute at issue in that case. The vested rights doctrine, therefore, has roots in both the Contracts Clause and due process.

joint stock enterprise shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint stock association during the term of such director or trustee." *Id.* at 435 (quoting Cal. Const. of 1879, § 3, art. 12). Coombes, a creditor of Getz Bros. and Co., brought suit against Getz, a director of that corporation, to recover the amount of an indebtedness upon an open account for goods sold to the corporation. *Id.* The trial court dismissed the action—on grounds not important here—and Coombes appealed. During the pendency of the appeal, the California Assembly repealed the provision of the California Constitution on which Coombes' action was based. *Id.* Getz moved to dismiss the appeal on the ground that the repeal had abated the cause of action.

The California Supreme Court granted the motion. In doing so, that court held that Coombes' cause of action was brought upon a statutory right that could be repealed at any time. Thus, because the cause of action had not been reduced to final judgment, the rights under the state constitution remained "inchoate" and fell with the repeal. Coombes appealed to the United States Supreme Court, claiming that the retrospective application of the repeal violated the Contracts Clause. The Supreme Court reversed.

The Supreme Court reasoned that a legislature's power to amend or repeal statutes is not unlimited: "neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired." *Id.* at 436. The Court then described Coombes' rights as they existed prior to the repeal:

> The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the *contractual liability created in pursuance of the rule.* Al-

> though the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which was in every sense a property right).

Id. (emphasis added).

The Supreme Court compared precedent on both sides of the issue, comparing each to its views of the vested rights Coombes sought to enforce. First, the Court examined three of its prior decisions, each of which held that rights under a statute had vested prior to the repeal of the statute creating the right; hence, the repeal could not stand as a barrier to enforcement of the right. *See Ettor v. Tacoma*, 228 U.S. 148, 156, 33 S. Ct. 428, 430, 57 L.Ed. 773 (1913) (statute mandating payments for property damage)[33]; *Joliffe*, 69 U.S. (2 Wall.) 450 (statute concerning payments of pilotage fees); *Hawthorne v. Calef*, 69 U.S. (2 Wall.) 10, 22, 17 L.Ed. 776 (1864) (statute concerning individual liability of shares of stockholders in railroad company for debts of the corporation).[34] Thereafter, the *Coombes* Court distinguished a

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[33] *Ettor* offered the following explanation why a vested right could not be defeated by subsequent legislation:

> Nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damages to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes and the right so vested cannot be defeated by subsequent legislation.

228 U.S. at ——, 33 S. Ct. at 430.

[34] It is true that the factual underpinnings of *Coombes* differ from those in *Joliffe*, *Ettor*, and *Hawthorne*; however, it would be incorrect to read too much into the distinction. The common thread linking each of those decisions is the general rule that "it is not consistent with due process to take away from a private party [by

line of California cases purportedly establishing that the repeal of a law creating a liability extinguished any pending cause of action brought under the repealed statute. 52 S. Ct. at 437-38. In distinguishing *Napa State Hosp. v. Flaherty*, 134 Cal. 315, 66 P. 322 (1901)[35], the Court stated:

> The case here is entirely different. There the obligation which was imposed upon the relatives was purely statutory. No act was contemplated on their part by way of assumption of an obligation in order to fix the liability. No element of a contract was present. Here both parties acted. The creditor extended credit to the corporation; and his action in so doing, under the state constitutional provisions, brought into force for his benefit the constitutional obligation of the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eye of the law, created against himself a contractual liability in the nature of a suretyship.

52 S. Ct. at 438. The Court concluded:

> It is settled by decisions of this and other federal courts . . . that upon the facts here disclosed, a con-

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subsequent legislative act] a right to recover the amount that is due when the act is passed." *Graham v. Goodcell*, 282 U.S. 409, 51 S. Ct. 186, 194 (1931) (citing, *inter alia*, *Joliffe* and *Ettor*).

[35] *Napa* involved a state statute that made the relatives of an insane person liable for that person's board during any period of commitment to a state-run insane asylum. During the hospital's suit against relatives of an insane person, the statute was repealed. In affirming dismissal of the suit, the California Supreme Court held that though the hospital had provided the insane person with board prior to the repeal, the repeal destroyed any right to recover from the family:

> where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy . . . .

66 P. at 323.

> tractual obligation arose; and the right having become vested, comes within the protection of both the contract impairment clause in article 1, § 10, and the due process clause in the Fourteenth Amendment of the federal Constitution.

Id.

Supreme Court decisions issued since *Coombes* and the line of cases preceding it have not overruled, either expressly or *sub silentio*, the rule of law discussed therein.[36] *See Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S. Ct. 2709, 81 L.Ed.2d 601 (1984) (discussing principles of due process governing retroactive application of federal legislation); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S. Ct. 2882, 49 L.Ed. 2d 752 (1976).[37]

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[36] The First Circuit, in *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986), questioned the vitality of *Coombes* and *Ettor*, stating that subsequent decisions have permitted the retroactive application of statutes which "abridged economic and real property rights" without "carefully distinguishing the older cases." *Id.* at 11. The Supreme Court decisions cited in *Hammond*, however, are either distinguishable on their facts—they involved Congress' exercise of its enumerated powers—and/or predate *Coombes*. *Cf. Connell v. United States*, 737 F. Supp. 61, 63 (S.D. Iowa 1990) (recognizing the rule created by *Coombes* and *Ettor*, but distinguishing those decisions from cases involving common law tort rights).

[37] In *Usery*, the Supreme Court cited several cases in support of its statement that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." 428 U.S. at 16, 96 S. Ct. at 2893. The decisions cited in *Usery* dealt with the power of Congress to exercise its enumerated powers; hence, they are distinguishable on their facts. *See e.g., Norman v. Baltimore & O Ry. Co.*, 294 U.S. 240, ——, 55 S. Ct. 407, 416, 79 L.Ed. 885 (1935) (contracts, even those which establish property rights, have a "cogenital infirmity" when they deal with subject matter lying within the control of Congress).

In addition, though the Association contends that the Supreme Court in *General Motors Corp. v. Romein*, 112 S. Ct. 1105, 117 L.Ed.2d 328 (1992), rejected contract clause and due process

Turning to the case at bar, it has already been established that under the pre-Amendment Act, the Association owed obligations to a GIC owner who was a Minnesota resident, even if that owner was not a participant in a pension plan. Adapting the principle stated in *Coombes*, Honeywell, in bringing this action to enforce its rights under the Act, is not relying on a statutory right that, until reduced to final judgment, remains inchoate. Here, the Association's payment and guarantee obligations, though arising from the Act, were based on the voluntary actions of both parties and thus were contractual in nature: Honeywell (through IDS) purchased covered GIC contracts from a member of the Association; its action in so doing, under the Act, brought into force for its benefit the statutory obligation of the Association, the members of which, by selling insurance in Minnesota, had voluntarily assumed, and thereby, in the eye of the law, created against themselves—in the form of the Association —a contractual liability. Whether this liability is considered one of surety or of guarantee, its nature as a *contractual* liability remains unchanged.

As the Association's liability under the Act was contractual, Honeywell's right to enforce that liability had become "fully perfected and vested" prior to the Amendment. As a result, the Amendment may have limited the Association's obligations in the future, but it did not and could not destroy or impair the previously vested right. *See Coombes*, 52 S. Ct. at 436. Accordingly, the right to enforce the Association's obligations came within the protection of both the Contracts Clause and Due Process Clause of the federal and Minnesota Constitutions. *See id.* at 438. Therefore, the Amendment, which had the effect of eliminating the Association's liability to IDS—and

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"vested rights" challenges to a retrospective amendment, a close reading of *Romein* does not support that conclusion. First, the term "vested rights" does not appear in *Romein*. Second, the references in *Romein* to "closed" periods and "closed transactions," 112 S. Ct. at 1110, 1112, are not akin to the rights discussed in *Coombes*.

through it, to Honeywell—violates those protections and cannot stand.[38]

D. Severability

Under Minnesota law, an unconstitutional amendment has no effect and leaves the statute as it was before the amendment. *Bongard v. Bongard*, 342 N.W.2d 156, 158 (Minn. Ct. App. 1983). In addition, Minn. Stat. § 645.20 provides that the provisions of all laws are severable unless the court finds the valid provisions of the law are so

> essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume that the legislature would have enacted the remaining valid provisions without the void ones, or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with legislative intent.

Based upon the foregoing, the Court concludes that the definition of "contractual obligation" shall exist as amended in 1992, except that section 61B.03, subd. 5(c), having been declared unconstitutional, is no longer part of the definition. The remaining portions of the Amendment are not facially dependent upon that subdivision and there is nothing in the record which indicates that the

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[38] Decisions by the Supreme Court have also indicated that retrospective legislation may offend due process if it is "particularly harsh and oppressive." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13, 97 S. Ct. 1505, 1515 n.13, 52 L.Ed.2d 92 (1977) (quoting *Welch v. Henry*, 305 U.S. 134, 147, 59 S. Ct. 121, 125, 83 L.Ed. 87 (1938)). Although the Supreme Court in *Gray* indicated that "harsh and oppressive" is synonymous with an "arbitrary and irrational" standard, 467 U.S. at 733, 104 S. Ct. at 2720, it can reasonably be stated that retrospective legislation that impairs or eliminates vested rights is harsh and oppressive. *See Goodcell*, 282 U.S. at ——, 51 S. Ct. at 194.

legislature would not have passed the Amendment if subdivision 5(c) were invalidated. Indeed, the Court has already determined that the pre-Amendment Act's definition of "contractual obligations" included the contracts at issue in the case at bar. The remainder of the definition does not more than express that fact.

III. Motion for Summary Judgment on the Subrogation Amendment

Honeywell's motion for summary judgment on the Subrogation Amendment has three prongs, each of which is based upon ERISA. First, Honeywell contends that subdivision 7(a) of the Subrogation Amendment cannot provide the Association with a right of action under ERISA because the Association would not have standing to bring a breach of fiduciary duty claim under ERISA. The Association responds that it would have the required standing as an assignee of plan participants' causes of action. Honeywell replies that the cases finding such "derivative standing" have no application to ERISA pension plans.

Section 502 of ERISA, 29 U.S.C. §1132(a), provides that a civil action may be brought by a plan "participant," "beneficiary," or "fiduciary," or by the Secretary of Labor. As the Association is not any of these, it does not have independent standing to maintain a breach of fiduciary duty claim. *Hermann Hosp. v. MEBA Med. & Ben. Plan*, 845 F.2d 1286, 1288 (5th Cir. 1988). However, notwithstanding Honeywell's assertions, nothing in ERISA's prohibition on assigning pension benefits, 29 U.S.C. § 1056(d), or case law interpreting that provision, precludes the Association from obtaining derivative standing to bring claims for breach of fiduciary duty under sections 1109 and 1132. 29 U.S.C. §§ 1109(a), 1132(a).

A cause of action for breach of fiduciary duty is not a "benefit" which exists under the plan; it is created by ERISA itself. Moreover, the purpose behind the anti-assignment clause, *see Misic v. Building Serv. Employees*

Health & Welfare Trust, 789 F.2d 1374, 1376-77 (9th Cir. 1986), has no relevance here; the participants in the Plans will receive their benefits when the Association fulfills its obligations under the Act. In fact, the Subrogation Amendment may actually facilitate recovery of lost benefits. Absent assigning their rights to the Association, plan participants must bring a cause of action against the plan and trustees for breach their ERISA-created fiduciary duties. Forcing plan participants to engage in litigation is at odds with ERISA's purpose of making plans whole—presumably achieving the desired result without having to engage in litigation is preferable to the alternative.

Honeywell next contends that the Subrogation Amendment is invalid because it interferes with ERISA's enforcement scheme by "redirecting" ERISA's remedial focus away from losses to covered plans. Honeywell claims that permitting the Association to gain assignment and subrogation rights would permit relief to inure to a party other than a covered *plan* and would assign liability to fiduciaries in the absence of any *loss* to the plan or its participants. *See Physicians Healthchoice, Inc. v. Trustees, Automotive Employee Benefit Trust*, 988 F.2d 53, 55 (8th Cir. 1993).

The rights the Association gains under the Subrogation Amendment are not improper merely because ERISA requires that actions brought under section 1132(a) seek only to restore losses incurred by covered plans. In this case, it is undisputed that the plan actually sustained losses, allegedly from Honeywell's breaches of fiduciary duty. It is only because the Association may be called upon to guarantee the GIC's that the losses to the participants may be minimized without resorting to litigation. The protection participants gain under the Act does not alter the fact that the losses suffered as a result of the allegedly imprudent investment in ELIC GIC's are losses of a type intended to be actionable under section

1109. *See Physicians Healthchoice*, 988 F.2d at 55. In addition, the availability of a remedy to the Association, namely repayment of expenditures which, but for the Act, would have been losses to the Plans, furthers a "cognizable ERISA interest" of the Plans and their participants. Based upon the foregoing, it is proper to construe "losses to the plan" broadly enough to include losses which are paid by a life and health insurance guaranty association pursuant to statute. *Cf. id.* at 56 (holding that interests of ERISA plan and participants are not furthered by an action brought by *a creditor* of an ERISA-covered health and welfare plan to recover past due payments).

Finally, Honeywell argues that subdivision 7(a) of the Subrogation Amendment is preempted to the extent that it concerns rights participants may have under ERISA plans. Honeywell claims that subdivision 7(a) is preempted under (1) *Greater Washington Bd. of Trade* because it specifically refers to ERISA, and (2) *Ingersoll-Rand*, because it is "connected to" an ERISA plan. However, the Court has earlier reviewed *Greater Wash. Bd. of Trade* and *Ingersoll-Rand*, as well as the insurance savings clause, and determines that subdivision 7(a) is not preempted by ERISA.[39]

In summary, the Court concludes that ERISA does not invalidate subdivision 7(a) of the Subrogation Amendment. Accordingly, the Association is entitled to be subrogated to, and receive assignment of, the rights of plan participants who receive benefits under the Act, as well as to any causes of action relating to the ELIC GIC's. Honeywell's assertion that subdivision 7(c) is preempted by ERISA likely is correct, *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S. Ct. 1549, 1553, 95 L.Ed.2d 39 (1987); however, in light of the Court's de-

[39] If Honeywell is correct in its claim that the Subrogation Amendment was preempted, Honeywell's right to make a claim to the Association, which is similarly connected to an ERISA plan, would also be preempted.

termination that the Association may bring claims of breach of fiduciary duty under ERISA, whether subdivision 7(c) is preempted need not be decided at this time.

Conclusion

Based on the files, records, and proceedings herein, and the briefs and arguments of counsel, IT IS ORDERED that:

1. plaintiff Honeywell's Motion for Summary Judgment (Doc. No. 6) is GRANTED as to Honeywell's claims in Counts III, IV, V and VI of the Complaint and is, in all other respects, DENIED;

2. defendant Association's Motion for Summary Judgment (Doc. No. 10) is GRANTED as to the Association's claim that the 1992 amendment to Minn. Stat. § 61B.06, subd. 7(a) is valid, and is, in all other respects, DENIED.

Dated: September 22, 1993

/s/ Richard H. Kyle
RICHARD H. KYLE
United States District Judge

APPENDIX G

MINNESOTA STATUTES

CHAPTER 61B

LIFE AND HEALTH GUARANTY ASSOCIATION

61B.01 CITATION.

Sections 61B.01 to 61B.16 may be cited as the Minnesota life and health insurance guaranty association act.

61B.02 SCOPE, PURPOSE AND CONSTRUCTION.

Subsection 1. **Scope.** Sections 61B.01 to 61B.16 apply to direct life insurance policies, health insurance policies including subscriber contracts issued by a nonprofit health service plan corporation operating under chapter 62C, annuity contracts, and contracts supplemental to life and health insurance policies or annuity contracts, issued by persons authorized at any time to transact insurance or business as a nonprofit health service plan corporation operating under chapter 62C in this state. Sections 61B.01 to 61B.16 do not apply to:

(a) any policy or contract or part thereof under which the risk is borne by the policyholder;

(b) any policy or contract or part thereof assumed by an impaired insurer under a contract of reinsurance other than reinsurance for which assumption certificates have been issued;

(c) any policy or contract issued by an assessment benefit association operating under chapter 63, or a fraternal benefit society operating under chapter 64B; or

(d) any health insurance policies issued by a person other than a person authorized to write life insurance in this state or other than a person whose corporate charter

would permit the writing of life insurance but who is authorized to write only health insurance in this state.

Subd. 2. **Purpose.** The purpose of sections 61B.01 to 61B.16, is to protect policyowners, death benefit certificate holders, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts, subject to certain limitations against failure in the performance of contractual obligations due to the impairment of the insurer issuing the policies or contracts. To provide this protection:

(a) An association of insurers is created to enable the guaranty of payment of benefits and of continuation of coverages;

(b) Members of the association are subject to assessment to provide funds to carry out the purpose of sections 61B.01 to 61B.16; and

(c) The association shall assist the commissioner, in the prescribed manner, in the detection and prevention of insurer impairments.

Subd. 3. **Construction.** Sections 61B.01 to 61B.16 shall be liberally construed to effect the purpose of sections 61B.01 to 61B.16. Subdivision 2 shall constitute an aid and guide to interpretation.

61B.03 DEFINITIONS.

Subdivision 1. **Scope.** For the purposes of sections 61B.01 to 61B.16, the terms defined in this section have the meanings given them.

Subd. 2. **Account.** "Account" means any of the three accounts created under section 61B.04, subdivision 1.

Subd. 3. **Annuity contracts.** "Annuity contracts" means contracts subject to chapter 61A wherein the policyowner agrees to make payments to the insurer at the beginning of the contract period and the insurer agrees to make pay-

ments thereafter to the insured for a specified period of time or until the insured's death.

Subd. 4. **Association.** "Association" means the Minnesota life and health insurance guaranty association created under section 61B.04. The association shall not be considered a state agency for purposes of chapter 16 or 43.

Subd. 5. **Contractual obligation.** "Contractual obligation" means any obligation under covered policies.

Subd. 6. **Covered policy.** "Covered policy" means any policy or contract owned by a Minnesota resident to which sections 61B.01 to 61B.16 apply, as provided in section 61B.02.

Subd. 7. **Direct life insurance.** "Direct life insurance" means life insurance generally, except annuity contracts, regulated under chapter 61A or 64B, credit life insurance regulated under chapter 62B, and death benefit certificates regulated under chapter 64B.

Subd. 8. **Health insurance.** "Health insurance" means accident and health insurance regulated under chapter 62A and credit accident and health insurance regulated under chapter 62B and subscriber contracts issued by a nonprofit health service plan corporation operating under chapter 62C.

Subd. 9. **Impaired insurer.** "Impaired insurer" means:

(a) An insurer which, after May 27, 1977, becomes insolvent and is placed under an order of liquidation, rehabilitation, or conservation by a court of competent jurisdiction; or

(b) An insurer determined by the commissioner, after May 27, 1977, to have become unable or potentially unable to fulfill its contractual obligations.

Subd. 10. **Member insurer.** "Member insurer" means any person authorized to transact in this state any kind of insurance or business to which sections 61B.01 to 61B.16 apply under section 61B.02.

Subd. 11. **Premiums.** "Premiums" means direct gross insurance premiums and annuity considerations written on covered policies, less return premiums and considerations thereon and dividends paid or credited to policyholders on direct business. Premiums do not include premiums and considerations on contracts between insurers and reinsurers. For the purpose of section 61B.07, premiums are those for the calendar year preceding the determination of impairment.

Subd. 12. **Person.** "Person" means any individual, corporation, partnership, association or voluntary organization.

Subd. 13. **Resident.** "Resident" means any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed.

Subd. 14. **Commissioner.** "Commissioner" means the commissioner of commerce of the state of Minnesota and, in the commissioner's absence or disability, a deputy or other person duly designated to act in the commissioner's place.

61B.04 CREATION OF ASSOCIATION.

Subdivision 1. **Nature of association.** There is created a nonprofit legal entity to be known as the Minnesota life and health insurance guaranty association. All member insurers shall be and remain members of the association as a condition of their authority to transact insurance in this state. The association shall perform its functions under the plan of operation established and approved under section 61B.08, and shall exercise its powers through a board of directors established under section 61B.05. For purposes of assessment, the association shall establish three accounts:

(a) The health insurance account;

(b) The life insurance account; and

(c) The annuity account.

Subd. 2. **Supervision by commissioner of commerce.** The association shall be under the immediate supervision of the commissioner and shall be subject to the insurance laws of this state.

61B.05 BOARD OF DIRECTORS.

Subdivision 1. **Composition of board.** The board of directors of the association shall consist of nine members. The members of the board shall be selected by the association members subject to the approval of the commissioner. Vacancies on the board shall be filled for the remaining period of the term in the manner described in the plan of operation.

Subd. 2. **Representative selection.** In approving selections or in appointing members to the board, the commissioner shall consider, among other things, whether all member insurers are fairly represented.

Subd. 3. **Compensation.** Members of the board may be reimbursed from the assets of the association for reasonable and necessary expenses incurred by them as members of the board, but shall not otherwise be compensated by the association for their services.

Subd. 4. **Committees and meetings.** Except as otherwise prescribed in the plan of operation:

(a) The board of directors may, by unanimous affirmative action of the entire board, designate two or more of their number to constitute an executive committee, which, to the extent determined by unanimous affirmative action of the entire board, has and shall exercise the authority of the board in the management of the business of the association. This executive committee shall act only in the interval between meetings of the board, and is subject at all times to the control and direction of the board.

(b) The board of directors may, by unanimous affirmative action of the entire board, create additional commit-

tees, which have and shall exercise the specific authority and responsibility as determined by the unanimous affirmative action of the entire board.

(c) Any action which may be taken at a meeting of the board of directors or of a lawfully constituted executive committee thereof may be taken without a meeting if authorized by a writing or writings signed by all the directors or by all of the members of the committee, as the case may be. This action is effective on the date on which the last signature is placed on the writing or writings, or an earlier effective date as set forth therein.

(d) Members of the board of directors or of a lawfully constituted executive committee thereof, may participate in a meeting of the board or committee by means of conference telephone or similar communications equipment through which all persons participating in the meeting can hear each other. Participation in a meeting pursuant to this clause constitutes presence in person at the meeting.

61B.06 POWERS AND DUTIES OF THE ASSOCIATION.

Subdivision 1. **Impaired domestic insurer.** (a) If a domestic insurer is an impaired insurer, the association may, prior to an order of liquidation, conservation or rehabilitation, and subject to any conditions imposed by the association and approved by the impaired insurer and the commissioner, other than those which impair the contractual obligations of the impaired insurer, guarantee, assume, or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of the impaired insurer, and shall make or cause to be made prompt payment of the contractual obligations of the impaired insurer which are due and owing.

(b) If a domestic insurer is an impaired insurer, the association shall, after entry of an order of liquidation, conservation or rehabilitation, subject to any conditions imposed by the association and approved by the commis-

sioner, guarantee, assume, or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of the impaired insurer, and shall make or cause to be made prompt payment of the contractual obligations of the impaired insurer which are due and owing.

Subd. 2. **Impaired foreign or alien insurer.** If a foreign or alien insurer is an impaired insurer under an order of liquidation, rehabilitation, or conservation, the association shall, subject to any conditions imposed by the association and approved by the commissioner, guarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured, the covered policies of residents, and shall make or cause to be made prompt payment of the impaired insurer's contractual obligations which are due and owing to residents.

Subd. 3. **Liens.** (a) In carrying out its duties under subdivision 1, clause (b), or 2, the association may request that there be imposed policy liens, contract liens, moratoriums on payments, or other similar means and the liens, moratoriums, or similar means may be imposed if the commissioner:

(1) Finds that the amounts which can be assessed under sections 61B.01 to 61B.16 are less than the amounts needed to assure full and prompt performance of the impaired insurer's contractual obligations, or that economic or financial conditions as they affect member insurers are sufficiently adverse to cause the imposition of policy or contract liens, moratoriums, or similar means to be in the public interest; and

(2) Approves the specific policy liens, contract liens, moratoriums, or similar means to be used.

(b) Before being obligated under subdivision 1, clause (b), or 2, the association may request that there be imposed temporary moratoriums or liens on payments of cash values and policy loans. The temporary moratoriums and liens may be imposed if approved by the commissioner.

Subd. 4. **Foreign jurisdiction coverage.** The association shall have no liability under this section for any covered policy of a foreign or alien insurer whose domiciliary jurisdiction or state of entry provides protection, by statutes or rule, for residents of this state, which protection is substantially similar to that provided by sections 61B.01 to 61B.16, for residents of other states and any recovery provided for under sections 61B.01 to 61B.16 shall be reduced by the amount of recovery under any such coverage provided by another state or jurisdiction.

Subd. 5. **Advisory function.** The association shall, upon the request of the commissioner, render assistance and advice concerning rehabilitation, payment of claims, continuations of coverage, or the performance of other contractual obligations of any impaired insurer.

Subd. 6. **Standing.** The association shall have standing to appear before any court in this state with jurisdiction over an impaired insurer concerning which the association is or may become obligated under sections 61B.01 to 61B.16. Standing shall extend to all matters germane to the powers and duties of the association, including proposals for reinsuring or guaranteeing the covered policies of the impaired insurer and the determination of the covered policies and contractual obligations.

Subd. 7. **Assignment; subrogation.** (a) Any person receiving benefits under sections 61B.01 to 61B.16 shall be deemed to have assigned rights under the covered policy to the association to the extent of the benefits received, whether the benefits are payments of contractual obligations or continuation of coverage. The association may require an assignment to it of the rights by any payee, policy or contract owner, beneficiary, insured, or annuitant as a condition precedent to the receipt of any rights or benefits conferred by sections 61B.01 to 61B.16 upon the person. The association shall be subrogated to these rights against the assets of any impaired insurer.

(b) The subrogation rights of the association under this subdivision shall have the same priority against the assets of the impaired insurer as that of the person entitled to receive benefits.

Subd. 8. **Extent of liability.** The contractual obligations of the impaired insurer for which the association becomes liable shall be only as great as the contractual obligations of the impaired insurer would have been in the absence of an impairment, unless the obligations are reduced as permitted by subdivision 3, but the aggregate liability of the association shall not exceed $100,000 in cash values, or $300,000 for all benefits, including cash values, with respect to any one life.*

Sub. 9. **Powers of association.** The association may:

(a) Enter into contracts necessary or proper to carry out the provisions of sections 61B.01 to 61B.16 and their purpose;

(b) Sue or be sued, including the taking of legal actions necessary or proper for recovery of unpaid assessments under section 61B.07;

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* [Text of subd. 8a as added by Laws 1991, c. 325, art. 5, § 2, effective August 1, 1992.]

Subd. 8a. **Adjustment of liability limits.** To the extent there are any limits for particular policies covered under this chapter, the dollar amounts stated in subdivision 8 shall be adjusted for inflation based upon the implicit price deflator for the gross national product compiled by the United States Department of Commerce and hereafter referred to as the index. The dollar amounts stated in subdivision 8 are based upon the value of the index for January 1990, which is the reference base index for purposes of this subdivision. The dollar amounts in subdivision 8 shall change on October 1 of each year after 1992, based upon the percentage difference between the index for January of the preceding year and the reference base index, calculated to the nearest whole percentage point. The commissioner shall announce and publish, on or before April 30 of each year, the changes in the dollar amounts required by this clause to take effect on October 1 of that year.

(c) Borrow money to effect the purposes of sections 61B.01 to 61B.16. Any notes or other evidence of indebtedness of the association not in default shall be legal investments for domestic insurers and may be carried as admitted assets;

(d) Employ or retain persons necessary to handle the financial transactions of the association, and perform other necessary or proper functions;

(e) Negotiate and contract with any liquidator, rehabilitator, conservator, or ancillary receiver to carry out the powers and duties of the association;

(f) Take legal action as may be necessary to avoid payment of improper claims;

(g) Exercise, for the purposes of sections 61B.01 to 61B.16 and to the extent approved by the commissioner, the powers of a domestic life or health insurer, but in no case may the association issue insurance policies or annuity contracts other than those issued to perform the contractual obligations of an impaired insurer.*

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* [Text of subd. 9 as amended by Laws 1991, c. 325, art. 5, § 3, effective August 1, 1992.]

Subd. 9. **Powers of association.** (a) The association may:

(1) enter into contracts necessary or proper to carry out the provisions of sections 61B.01 to 61B.16 and their purpose;

(2) sue or be sued, including the taking of legal actions necessary or proper for recovery of unpaid assessments under section 61B.07;

(3) borrow money to effect the purposes of sections 61B.01 to 61B.16. Any notes or other evidence of indebtedness of the association not in default shall be legal investments for domestic insurers and may be carried as admitted assets;

(4) employ or retain persons necessary to handle the financial transactions of the association, and perform other necessary or proper functions;

(5) negotiate and contract with any liquidator, rehabilitator, conservator, or ancillary receiver to carry out the powers and duties of the association;

(6) take legal action as may be necessary to avoid payment of improper claims; and

61B.07 ASSESSMENTS.

Subdivision 1. **Assessment by board.** For the purpose of providing the funds necessary to carry out the powers and duties of the association, the board of directors shall assess the member insurers separately for each account, at the times and for the amounts the board finds necessary. Assessments are due on the date specified by the board. This date shall not be less than 30 days after prior written notice thereof to the member insurers, and shall accrue interest at the rate of six percent a year on and after the due date.

Subd. 2. **Classes of assessments.** There shall be three classes of assessments, as follows:

(a) Class A assessments shall be made for the purpose of meeting administrative costs and other general expenses not related to a particular impaired insurer and conducting examinations under section 61B.10;

(b) Class B assessments shall be made to the extent necessary to carry out the powers and duties of the association under section 61B.06 with regard to impaired domestic insurers;

(c) Class C assessments shall be made to the extent necessary to carry out the powers and duties of the association under section 61B.06 with regard to impaired foreign or alien insurers.

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(7) exercise, for the purposes of sections 61B.01 to 61B.16 and to the extent approved by the commissioner, the powers of a domestic life or health insurer, but in no case may the association issue insurance policies or annuity contracts other than those issued to perform the contractual obligations of an impaired insurer.

(b) The association must borrow any money necessary to effect the purposes of sections 61B.01 to 61B.16. Any notes or other evidence of indebtedness of the association not in default are legal investments for domestic insurers and may be carried as admitted assets.

Subd. 3. **Formula for determination.** (a) The amount of any class A assessment shall be determined by the board and may be made on a non-pro rata basis. The amount of any class B or C assessment shall be allocated for assessment purposes among the accounts in the proportion that the premiums received by the impaired insurer on the policies covered by each account bear to the premiums received by the impaired insurer on all covered policies.

(b) Class C assessments against member insurers for each account shall be in the proportion that the premiums received on business in this state by each assessed member insurer on policies covered by each account bear to premiums received on business in this state by all assessed member insurers. Notwithstanding the foregoing, the minimum class C assessment against a member insurer is $10.

(c) Class B assessments for each account shall be made separately for each state in which the impaired domestic insurer was authorized to transact insurance at any time, in the proportion that the premiums received on business in the state by the impaired insurer on policies covered by the account bear to premiums received in all states by the impaired insurer. The assessments against member insurers shall be in the proportion that the premiums received on business in each state by each assessed member insurer on policies covered by each account bears to premiums received on business in the state by all assessed member insurers. Notwithstanding the foregoing, the minimum class B assessment against a member insurer is $10.

(d) Assessments for funds to meet the requirements of the association with respect to an impaired insurer shall not be made until necessary to implement the provisions of sections 61B.01 to 61B.16. Classifications of assessments under subdivision 2, and computation of assessments under this subdivision shall be made with a reason-

able degree of accuracy, recognizing that exact determinations may not always be possible.

Subd. 4. **Abatement or deferment.** The association may abate or defer, in whole or in part, the assessment of a member insurer if, in the opinion of the board, payment of the assessment would endanger the ability of the member insurer to fulfill its contractual obligations. The total of all assessments upon a member insurer for each account shall not, in any one calendar year, exceed two percent of the insurer's premiums in this state on the policies covered by the account.

Subd. 5. **Additional assessment.** In the event that an assessment against a member insurer is abated, or deferred, in whole or in part, because of the limitations set forth in subdivision 4, the amount by which the assessment is abated or deferred may be assessed against other member insurers in a manner consistent with the basis for assessments set forth in this section. If the maximum assessment, together with the other assets of the association, does not provide in any one year an amount sufficient to carry out the responsibilities of the association, the necessary additional funds shall be assessed as soon thereafter as permitted by sections 61B.01 to 61B.16.

Subd. 6. **Refund.** The board may, by an equitable method as established in the plan of operation under section 61B.08, refund to member insurers, in proportion to their contributions to particular accounts, the amount by which the assets of the account exceed the amount the board finds necessary to carry out during the coming year the obligations of the association with regard to that account, including assets accruing from net realized gains and income from investments. A reasonable amount may be retained in any account to provide funds for the continuing expenses of the association and for future losses if refunds are impractical.

Subd. 7. **Certificate of contribution.** The association shall issue to each insurer paying an assessment under sec-

tions 61B.01 to 61B.16, other than a class A assessment, a certificate of contribution, in a form prescribed by the commissioner, for the amount of the assessment paid. All outstanding certificates shall be of equal dignity and priority. A certificate of contribution may be shown by the insurer in its financial statement as an admitted asset in the form and for the amount and period of time as the commissioner may approve.

61B.08 PLAN OF OPERATION.

Subdivision 1. **Adoption and amendment.** (a) The association shall submit to the commissioner a plan of operation and amendments thereto, as necessary or suitable to assure the fair, reasonable, and equitable administration of the association. The plan of operation and amendments thereto shall be effective upon approval in writing by the commissioner.

(b) If the association fails to submit a suitable plan of operation within 180 days after May 27, 1977 or if at any time thereafter the association fails to submit suitable amendments to the plan, the commissioner shall, after notice and hearing, adopt and promulgate reasonable rules as necessary or advisable to effectuate the provisions of sections 61B.01 to 61B.16. The rules shall continue in force until modified by the commissioner or superseded by a plan submitted by the association and approved by the commissioner. If the commissioner finds that the operation of the association will be unreasonably delayed or impaired by compliance with the rule making requirements of section 14.14, subdivision 1, the commissioner may promulgate emergency rules in accordance with sections 14.29 to 14.36.

Subd. 2. **Compliance.** All member insurers shall comply with the plan of operation.

Subd. 3. **Contents.** The plan of operation shall:

(a) Establish procedures for handling the assets of the association;

(b) Establish the amount and method of reimbursing members of the board of directors;

(c) Establish regular places and times for meetings of the board of directors;

(d) Establish procedures for maintaining records of all financial transactions of the association, its agents, and the board of directors;

(e) Establish the procedures for making selections for the board of directors and submitting them to the commissioner;

(f) Establish additional procedures for assessments under section 61B.07;

(g) Establish procedures for employing or retaining persons necessary to handle the financial transactions and other necessary and proper functions of the association; and

(h) Contain additional provisions necessary or proper for the execution of the powers and duties of the association.

Subd. 4. **Delegation of powers and duties.** The plan of operation may provide that any or all powers and duties of the association, except those authorized under sections 61B.06, subdivision 9, clause (c), and 61B.07, are delegated to another organization which performs or will perform functions similar to those of the association in two or more states. The other organization shall be reimbursed for any payments made on behalf of the association and paid for its performance of any association function. A delegation shall take effect only with the approval of both the board of directors and the commissioner, and may be made only to an organization which extends protection substantially as favorable and effective as that provided by sections 61B.01 to 61B.16.

61B.09 DUTIES AND POWERS OF THE COMMISSIONER.

Subdivision 1. The commissioner shall:

(1) Notify the board of directors of the existence of an impaired insurer within three days after a determination of impairment is made or the commissioner receives notice of impairment;

(2) Upon request of the board of directors, provide the association with a statement of the premiums in the appropriate states for each member insurer; and

(3) When an impairment is declared and the amount determined, serve a demand upon the impaired insurer to make good the impairment within a reasonable time. Notice to the impaired insurer shall constitute notice to its shareholders. The failure of the insurer to promptly comply with the demand shall not excuse the association from performance under sections 61B.01 to 61B.16.

Subd. 2. The commisioner may, after notice and hearing, suspend or revoke the certificate of authority to transact insurance in this state of any member insurer which fails to pay an assessment when due or to comply with the plan of operation. As an alternative, the commissioner may levy a forfeiture on any member insurer which fails to pay an assessment when due. A forfeiture shall not exceed five percent of the unpaid assessment per month, but no forfeiture shall be less than $100 per month.

Subd. 3. Any action of the board of directors or the association may be appealed to the commissioner within 30 days of the notice of the action. Any final action or order of the commissioner shall be subject to judicial review in a court of competent jurisdiction, in the manner provided by chapter 14. In lieu of the appeal to the commissioner under this subdivision, a claimant may seek judicial review of the board's actions.

Subd. 4. The liquidator, rehabilitator, or conservator of any impaired insurer may notify all interested persons of the effect of sections 61B.01 to 61B.16.

61B.10 PREVENTION OF IMPAIRMENTS.

To aid in the detection and prevention of insurer impairments:

(a) The board of directors may, upon majority vote, notify the commissioner of commerce indicating that a member insurer may be unable or potentially unable to fulfill its contractual obligations.

(b) The board of directors may, upon majority vote, request that the commissioner order an examination of any member insurer which the board believes may be unable or potentially unable to fulfill its contractual obligations. The commissioner may conduct the examination. The examination may be conducted as a national association of insurance commissioners examination or by persons the commissioner designates. The cost of the examination shall be paid by the association and the examination report treated as are other examination reports. In no event shall the examination report be released to the board of directors of the association prior to its release to the public, but this shall not excuse the commissioner from the obligation to comply with clause (c). The commissioner shall notify the board of directors when the examination is completed. The request for an examination shall be kept on file by the commissioner, but shall not be open to public inspection prior to the release of the examination report to the public and shall be released at that time only if the examination discloses that the examined insurer is unable or potentially unable to meet its contractual obligations.

(c) The commissioner shall report to the board of directors when the commissioner has reasonable cause to believe that any member insurer examined at the request

of the board of directors may be unable or potentially unable to fulfill its contractual obligations.

(d) The board of directors may, upon majority vote, make report and recommendations to the commissioner upon any matter germane to the solvency, liquidation, rehabilitation or conservation of any member insurer. The reports and recommendations shall not be considered public documents.

(e) The board of directors may, upon majority vote, make recommendations to the commissioner for the detection and prevention of insurer impairments.

(f) The board of directors may, at the conclusion of any insurer impairment in which the association carried out its duties or exercised powers under sections 61B.01 to 61B.16, prepare a report on the history and causes of the impairment, based on the information available to the association, and submit the report to the commissioner.

61B.11 DELEGATION BY COMMISSIONER.

For the purposes of sections 61B.01 to 61B.16, the commissioner may delegate any of the powers conferred by law.

61B.12 MISCELLANEOUS PROVISIONS.

Subdivision 1. **Construction.** Nothing in sections 61B.01 to 61B.16 shall be construed to reduce the liability for unpaid assessments of the insureds of an impaired insurer operating under a plan with assessment liability.

Subd. 2. **Records.** Records shall be kept of all negotiations and meetings in which the association or its representatives are involved to discuss the activities of the association in carrying out its powers and duties under section 61B.06. Records of negotiations or meetings shall be made public only upon termination of a liquidation, rehabilitation, or conservation proceeding involving an impaired insurer, termination of the impairment of the

insurer, or order of a court of competent jurisdiction. Nothing in this subdivision shall limit the duty of the association to render a report of its activities under section 61B.13.

Subd. 3. **Association as creditor.** For the purpose of carrying out its obligations under sections 61B.01 to 61B.16, the association shall be deemed to be a creditor of the impaired insurer to the extent of assets attributable to covered policies reduced by any amounts to which the association is entitled as subrogee pursuant to section 61B.06, subdivision 7. All assets of the impaired insurer attributable to covered policies shall be used to continue all covered policies and pay all contractual obligations of the impaired insurer as required by sections 61B.01 to 61B.16. Assets attributable to covered policies, as used in this subdivision, means that proportion of the assets which the reserves that should have been established for the policies bear to the reserve that should have been established for all policies of insurance written by the impaired insurer.

Subd. 4. **Distribution to stockholders.** No distribution to stockholders of an impaired insurer shall be made until the total amount of assessments levied by the association with respect to the insurer have been fully recovered by the association.

Subd. 5. **Prohibited sales practice.** No person shall make use of the protection afforded by sections 61B.01 to 61B.16 in the sale of insurance. Any person violating this section shall be guilty of a misdemeanor.*

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* [Text of subd. 6 as amended by Laws 1991, c. 325, art. 5, §§ 4, 5.]

Subd. 6. **Notice concerning limitations and exclusions.** On and after January 1, 1992, no person, including an insurer, agent, or affiliate of an insurer or agent, shall offer for sale in this state a covered life insurance, annuity, or health insurance policy or contract without delivering at the time of application for that policy or contract a separate notice in the form the commissioner from time to time may approve for use in this state relating to

61B.13 EXAMINATION OF THE ASSOCIATION; ANNUAL REPORT.

The association shall be subject to examination and regulation by the commissioner. The board of directors shall submit to the commissioner, before May 1 each year, a financial report for the preceding calendar year in a form approved by the commissioner and a report of its activities during the preceding calendar year.

61B.14 TAX EXEMPTIONS.

Subdivision 1. **State fees and taxes.** The association shall be exempt from payment of all fees and all taxes levied by this state or any of its subdivisions, except taxes levied on real property.

Subd. 2. **Federal and foreign state taxes.** The association may seek exemption from payment of all fees and taxes levied by the federal or any other state government or any subdivisions thereof.

61B.15 INDEMNIFICATION.

The association has authority to indemnify certain persons against certain expenses and liabilities as provided in section 300.083 including the power to purchase and maintain insurance on behalf of these persons as provided by section 300.083, subdivision 7. In applying section

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coverage provided by the Minnesota Life and Health Insurance Guaranty Association. The notice must be signed by the applicant and kept on file by the person offering the policy or contract for sale. A copy of the signed notice must be given to the applicant.

Subd. 7. Effect of notice. The distribution, delivery, or contents or interpretation of the notice described in subdivision 6 shall not mean that either the policy or contract, or the owner or holder thereof, would be covered in the event of the impairment of a member insurer if coverage is not otherwise provided by this chapter. Failure to receive the notice does not give the policyholder, contract holder, certificate holder, insured, owner, beneficiaries, assignees, or payees any greater rights than those provided by this chapter.

300.083 for this purpose, the term "member insurers" shall be substituted for the terms "shareholders" and "stockholders" and the term "association" shall be substituted for the term "corporation."

61B.16 STAY OF PROCEEDINGS; REOPENING DEFAULT JUDGMENTS.

All proceedings in which the impaired insurer is a party in a court in this state shall be stayed 60 days from the date that a final order of liquidation, rehabilitation or conservation is entered as to the impaired insurer, to permit legal action by the association on any matters germane to its powers or duties. The association may, at any time when an insurer is an impaired insurer, apply to have a judgment under a decision, order, verdict, or finding based on default of the impaired insurer set aside by the court that made the judgment and shall be permitted to defend against the suit on the merits.

APPENDIX H

HONEYWELL INC.
Subsidiaries and Affiliates
(1-99% Ownership)

BRAZIL: Embrasid S. A.
CANADA: Comcept Canada Inc.
CHINA: Beijing Yamatake-Sic Control Systems Co., Ltd.
CHINA: Dalian Yamatake Control Instruments Co., Ltd.
CHINA: Shanghai Yamatake-Sic Building Automation Co., Ltd.
CHINA: Shanghai Yamatake Jinshan Control Instruments Co., Ltd.
CHINA: Sinopec Honeywell (Tianjin) Limited
INDIA: Honeywell India Ltd.
INDIA: Tata Honeywell Limited
ITALY: S.C. Alenia—Honeywell S.p.A.
ITALY: Sinted S.p.A.
JAPAN: NEC-Honeywell Space Systems Ltd. ("NHSS")
JAPAN: Yamatake—Honeywell Co., Ltd.
JAPAN: Taishin Co., Ltd.
JAPAN: Yamatake & Co., Ltd.
JAPAN: Yamatake Keiso Co., Ltd.
JAPAN: Yamatake Engineering Co., Ltd.
JAPAN: Yamatake Control Products Co., Ltd.
JAPAN: Yamatake Techno-Systems Co., Ltd.
KOREA: LG-Honeywell Company, Ltd.
KUWAIT: Honeywell Kuwait K.S.C.
MALAYSIA: Berkat Honeywell SDN BHD
NETHERLANDS: Cara C' Air B.V.
NETHERLANDS: Turnkiek Process Control B.V.
NORWAY: Nord Ventilasjon A/S
OMAN: Honeywell & Co., Oman L.L.C.
RUSSIA: Honeywell-STERCH Industrial Controls
SAUDI ARABIA: Honeywell Turki-Arabia Limited
SAUDI ARABIA: Saudi Arabian Tetra Tech Limited
THAILAND: Yamatake-Honeywell (Thailand) Co., Ltd.

TURKEY: Honeywell Otomasyon ve Kontrol Sistemleri Sanayi ve Ticaret A.S.
UKRAINE: Honeywell Ltd.
USA: Foster/Honeywell Joint Venture
USA: GE/Micro Switch Control Inc., a Joint Venture
USA: Kenwood Properties Inc.
USA: YCV Corporation